Supreme Court, U.S.
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No. 91-2078

IN THE

Supreme Court of the United States

October Term, 1991

MARION LIBBIE KAMISUGI,
Petitioner,

vs.

HEINZ KUHNERT and SHERILYN MARIE KUHNERT,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of the State of Hawaii

BRIEF IN OPPOSITION

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Dated: July 17, 1992

QUESTIONS PRESENTED FOR REVIEW

A. Whether this Court has jurisdiction to consider the Petition for Writ of Certiorari when Petitioner failed to raise any federal question at trial or on appeal?

B. Whether this Court has jurisdiction to consider the Petition for Writ of Certiorari when the Supreme Court of Hawaii had adequate non-federal grounds to deny Petitioner's Motion for Reconsideration?

C. Whether the Supreme Court of Hawaii's affirmance of the trial court's ruling - - that a corporation would be vicariously liable for the acts of its president (Petitioner) and instruction to the jury that it may award punitive damages against a corporate officer only if she was found to have participated in the fraud by "clear and convincing evidence" - - protected the Petitioner's due process rights?

PARTIES TO THE PROCEEDING

The parties to the proceedings below were: Heinz W. Kuhnert, Sherilyn Marie Kuhnert, Clyde H. Allison, Libbie & Company, Inc., a Hawaii corporation, Marion Libbie Kamisugi, Darlene M. Osterman, and Herbert David Osterman.

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MARION LIBBIE KAMISUGI,

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vs.

HEINZ KUHNERT and SHERILYN MARIE KUHNERT,

Respondents.

PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of the State of Hawaii

BRIEF IN OPPOSITION

Respondents Heinz Kuhnert and Sherilyn Marie Kuhnert respectfully request that this Court deny the petition for writ of certiorari to review the Judgment on Appeal entered by the Supreme Court of Hawaii on March 25, 1992 in ***Heinz W. Kuhnert and Sherilyn Marie Kuhnert vs. Clyde H. Allison, Libbie & Company, Inc., a Hawaii Corporation, Marion Libbie Kamisugi, Darlene M. Osterman, Herbert David Osterman, John Doe 1-5, Doe Corporation 1-5, Doe Partnerships 1-5 and Doe Governmental Entities 1-5***, Supreme Court of Hawaii No. 14956.

OPINIONS BELOW

The Petitioner seeks review of the unreported Judgment on Appeal of the Supreme Court of Hawaii, dated March 25, 1992. (Appendix A at A1). The Judgment was entered pursuant to the Supreme Court of Hawaii's unreported Memorandum Opinion, dated March 19, 1992. (Appendix D at A35). The Supreme Court of Hawaii's unreported Order Denying Petitioner's Motion for Reconsideration was entered on March 25, 1992. (Appendix B at A4)

JURISDICTION

Petitioner seeks review of the Judgment on Appeal issued on March 25, 1992, by the Supreme Court of Hawaii, pursuant to its Memorandum Opinion of March 13, 1992, which affirmed the First Amended Judgment issued by the Circuit Court of the First Circuit, State of Hawaii on October 18, 1990. (Appendix H at A257).

The Petitioner's appeal to the Hawaii Supreme Court utterly failed to "specially set up or claim" any federal question as required under 28 U.S.C. § 1257(a). (Appendices E at A44 and G at A178).

This Court lacks jurisdiction to consider the petition because the Petitioner did not raise any federal question at trial nor on appeal. The Petitioner first raised a federal question in her Motion for Reconsideration on March 23, 1992. (Appendix C, at A7).

Petitioner's "Statement of the Case", omitted the information required by Supreme Court Rule 14(h) showing that "the federal question was timely and properly raised."

Supreme Court Rule 14(h), provides:

> (h) If review of a judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings, both in the court of first instance and in the appellate courts, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by those courts; and such pertinent quotation of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears (e.g., ruling on exception, portion of court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on a writ of certiorari.

Petitioner states that, "By way of its Memorandum Opinion and Order Denying Motion for Reconsideration, the Supreme Court of Hawaii addressed and passed upon the due process claims asserted by Kamisugi." (Petition at 14). However, the Order Denying Motion for Reconsideration entered on March 25, 1992, merely states in its entirety,

> Upon consideration of appellant Marion Libbie Kamisugi's motion for reconsideration filed March 23, 1992, the joinder of appellants Darlene and Herbert Osterman filed the same day, the joinder of appellants Clyde Allison and Libbie & Company (filed one day late), the memoranda in support thereto, and the record below,
>
> IT IS HEREBY ORDERED that the motion and the joinders to the motion are hereby denied. (Appendix B at A4).

The Supreme Court of Hawaii did not "address" nor "pass" upon the due process claims. The Petitioner can provide no record to establish jurisdiction of this Court.

The Supreme Court of Hawaii had adequate non-federal grounds for denying the Petitioner's motion for reconsideration. The Petitioner failed to conform to procedural requirements in bringing her appeal in the Supreme Court of Hawaii.

PROVISIONS OF LAW

Petitioner alleged violation of her due process rights under Amendment XIV, §1 of the United States Constitution and Article I, §5 of the Hawaii Constitution for the first time in her Motion for Reconsideration to the Supreme Court of Hawaii.

United States Constitution, Amendment XIV, §1, states:

> **Section 1**. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Court's jurisdiction is by 28 U.S.C. §1257 (a):

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or

laws of the United States, or where any title, right or privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

The Hawaii Constitution Article I, § 5 provides:

> **Section 5.** No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry.

STATEMENT OF THE CASE

Petitioner Marion Libbie Kamisugi "Kamisugi" seeks review of a judgment by the Supreme Court of Hawaii which affirmed the trial court's judgment for $433,000.00 in compensatory damage, $293,000.00 in punitive damages and interest thereon against her. The jury found that Kamisugi, a real estate broker, fraudulently misrepresented, concealed material information and breached her fiduciary duty to her clients, Respondents Heinz Kuhnert and Sherilyn Kuhnert. (Appendix A140).

In 1983, the Kuhnerts were represented in the sale of their home by Libbie & Company, Inc. "Company", whose sole stockholder, President, Director and Principal Broker is, Petitioner Kamisugi. Kamisugi admitted she knew that the buyers, Herbert David Osterman and Darlene Osterman, could not afford to buy the Kuhnerts' home which was listed at $1.3 million. Kamisugi discussed structuring the transaction about "four million" times with her Vice-President Clyde Allison so that the sale could be effectuated despite the buyers' lack of money.

The Kuhnerts were convinced to accept the Ostermans' condominium which was represented to be worth $1 million as partial payment for the purchase of their home. The condominium had, in fact, been appraised for less than half that amount only a year and a half earlier in a non-appreciating real estate market. Kamisugi knew that her Vice-President Clyde Allison represented the million dollar value of the condominium to the Kuhnerts although he had no basis for this representation other than statements by the Ostermans.

Kamisugi never disclosed to her clients, the Kuhnerts, the following facts: 1) The Ostermans admitted they could not afford to buy the Kuhnerts' home; 2) Neither she nor Allison knew the value of the Ostermans' condominium; 3) Darlene Osterman was a licensed real estate agent and there was a statutory duty to disclose this to the Kuhnerts; 4) Although Darlene Osterman was entitled to share in the commission, she waived her share of the $78,000.00 commission in favor of Kamisugi's company; 5) Darlene Osterman left her real estate firm only one week after signing the purchase agreement and joined Kamisugi's company the following week; and 6) Kamisugi also obtained the listing to sell the Ostermans' condominium the same day that Darlene Osterman transferred her real estate license to Kamisugi's company.

Kamisugi complains she should not have been listed on the verdict form with her Company. During settlement of jury instructions and the verdict form, the trial court ruled that both Allison and Kamisugi held sufficiently high positions in the Company so that if either were found liable, he would enter judgment against the Company. However, the trial judge offered the option of omitting the Company from the verdict form or listing the Company separately from the individuals on the verdict form. Kamisugi's

counsel specifically declined both options, thus waiving any claim of error. (Respondent's Brief, Appendix A124-5).

The jury was instructed that "officers, directors, or shareholders of a corporation are not personally liable for the wrongful or tortious conduct of the corporation or its other officers, directors or agents unless such officers, directors or shareholders authorized, ordered or in some manner participated in such wrongful conduct." (Jury Instruction 21, Appendix A168). The jury was instructed that a finding of fraud could only be made upon clear and convincing evidence. The jury was further instructed that punitive damages could only be awarded upon clear and convincing evidence of willful, wanton or conduct raising a presumption of a conscious indifference to consequences, which is the standard of proof in Hawaii for an award of punitive damages. ***Masaki v. General Motors Corporation***, 71 Hawaii 1, 780 P. 2d 566 (1989). (See Jury Instructions at A166 and A171).

On appeal, Kamisugi alleged numerous points of error, but did not raise any federal question. (Defendant-Appellant's Opening Brief, Appendix G at A199-203). She claimed there was plain error in the jury instructions and verdict form, however the Supreme Court of Hawaii found no plain error.

In sustaining the judgment, the Hawaii Court held,

> Our review of the evidence indicates to us that the jury was justified in finding clear and convincing evidence of her participation in the fraud . . . In our view, there was abundant circumstantial evidence to support a verdict of fraud, whether the standard be clear and convincing evidence, as appellant [Kamisugi] urged in some of her points, or merely substantial evidence as she urges in others.

(Memorandum Opinion of the Supreme Court of Hawaii, Appendix A39-40).

Kamisugi filed her Motion for Reconsideration which was summarily denied on March 25, 1992.

ARGUMENT

The Court should deny this petition because the Court lacks jurisdiction for the following:

(1) The "federal question" was not properly raised at trial nor on appeal. No "federal question" was ever decided by the Supreme Court of Hawaii when it denied the Petitioner's Motion for Reconsideration;

(2) There were adequate non-federal grounds for the decision by the Hawaii Supreme Court; and

(3) There were no due process violations at trial nor on appeal.

A. THE COURT LACKS JURISDICTION TO CONSIDER THIS PETITION FOR WRIT OF CERTIORARI. A FEDERAL QUESTION WAS NEVER PROPERLY RAISED AT TRIAL NOR ON APPEAL.

The Court lacks jurisdiction to review the Supreme Court of Hawaii's decision because Petitioner never raised a federal question at trial or on appeal. Petitioner first alleged a "federal question" in the motion for reconsideration to the Supreme Court of Hawaii which denied the motion without deciding the federal question.

This Court has consistently denied certiorari when the federal question was not seasonably raised or when first raised in a motion for reconsideration of a state supreme court's decision. In ***Cardinale v. Louisiana***, 394 U.S. 437,

438, 22 L.Ed.2d 398, 89 S.Ct. 1162 (1969), the Court held,

> The sole federal question argued here had never been raised, preserved or passed upon in the state courts below. It was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions. . . . [T]his court (has) no jurisdiction unless a federal question was raised and decided in the state court below. If both of these do not appear on the record, the appellate jurisdiction fails. The court has consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions both before the *Crowell* opinion . . . and since. . . . citing ***Crowell v. Randell***, 10 Pet. 368, 391 (1836). (emphasis added).

In ***Dewey v. Des Moines***, 173 U.S. 193, 200, (1899), the Court held, "A claim or right which has never been made or asserted cannot be said to have been denied by a judgment which does not refer to it."

In ***Banker's Life & Casualty Co., v. Crenshaw***, 486 U.S. 71, 76, 108 S.Ct. 1645, 100 L.Ed 62 (1988), the Court declined jurisdiction over a claim that a punitive damage award violated the due process clause because, "[T]hese claims were not raised and passed upon in State Court."; ***Radio Station WOW v. Johnson***, 326 U.S. 120, 128, 65 S.Ct. 1475, 1480, 89 L.Ed. 2092 (1942); ***Herndon v. Georgia***, 295 U.S. 441, 443, 55 S.Ct. 794, 79 L.Ed. 130 (1935); ***McGarrity v. Delaware River Bridge Com.***, 292 U.S. 19, 20, 78 L.Ed. 1095, 54 S.Ct. 565, reh'g denied 292 U.S. 607, 78 L.Ed 1468, 54 S.Ct. 771 (1934) (A federal question was not raised prior to petition for

rehearing before the state supreme court and no federal question was presented where rehearing was denied without an opinion); ***Missouri Pac. R. Co. v. Hanna***, 266 U.S. 184, 69 L.Ed. 1135, 45 S.Ct. 36 (1925) (Writ of certiorari will be denied where the record failed to disclose that the petitioner raised a federal issue in either the trial court or state supreme court); ***Rooker v. Fidelity Trust Co.***, 261 U.S. 114, 67 L.Ed 556, 43 S.Ct. 288 (1923); ***Bilby v. Stewart***, 246 U.S. 255, 62 L.Ed.701, 38 S.Ct. 264 (1918); ***State of Montana v. Rice***, 204 U.S. 291, 27 S.Ct. 281, 284, 51 L.Ed. 490 (1907); ***McMillen v. Ferrum Mining Co.***, 197 U.S. 343, 49 L.Ed 784, 25 S.Ct. 533 (1905); ***Pim v. St. Louis***, 165 U.S. 273, 41 L.Ed 714, 17 S.Ct. 322 (1897). (A claim of a federal right comes too late when made for the first time after a final decision by the state supreme court and then by a petition for rehearing which is denied without determination of the alleged federal question).

It is generally improper to raise a federal question for the first time in a petition to rehear a decision of a state's highest court. ***Hanson v. Denkla***, 357 U.S. 235, 2 L.Ed.2d 1283, 78 S.Ct. 1228, reh'g denied 358 U.S. 858, 3 L.Ed.2d 92, 79 S.Ct. 10 (1958). However, there are two exceptions to this rule recognized by the Court. A federal question may be noted for the first time in a motion for rehearing in a state supreme court, if the federal question first unanticipatedly arose in that court's opinion. ***Herndon v. Georgia***, 295 U.S. 441, 444, 79 L.Ed 1530, 55 S.Ct. 794 (1935). The second exception is if the federal question was raised for the first time in a petition for rehearing and the state court grants the rehearing and determines the federal issue. ***Illinois C. R. Co. v. Kentucky***, 218 U.S. 551, 54 L.Ed 1147, 31 S.Ct. 95 (1910). These exceptions do not apply in this case because the alleged "federal

question" did not arise unanticipatedly and the Supreme Court of Hawaii denied the motion for reconsideration without ever deciding the federal question.

Petitioner claims, "By way of its Memorandum Opinion and Order Denying Motion for Reconsideration, the Supreme Court of Hawaii addressed and passed upon the due process claim asserted by Kamisugi". (Petition at page 14). This is a blatant misrepresentation by Petitioners, because no federal question was ever addressed by the Supreme Court of Hawaii. (Appendices E at A44 and G at A178).

In *Lynch v. New York*, 293 U.S. 52, 54, 79 L.Ed. 191, 55 S.Ct. 16 (1934), the Court held,

> Jurisdiction cannot be founded upon surmise....It is essential to the jurisdiction of this Court in reviewing a decision of a court of a state that it must appear affirmatively from the record, not only that a federal question was presented for a decision to the highest court of the state having jurisdiction, but that its decision of the federal question was necessary to the determination of the case, and that it was actually decided or that the judgment as rendered could not have been given without deciding it. (emphasis added).

The Petitioner failed to properly raise a federal question at trial or on appeal. The Court lacks jurisdiction to consider this petition for writ of certiorari.

B. THE SUPREME COURT OF HAWAII HAD ADEQUATE NON-FEDERAL GROUNDS FOR ITS DECISION WHICH PRECLUDES JURISDICTION BY THE COURT.

The Court does not have jurisdiction to consider this petition because the Supreme Court of Hawaii had adequate and independent non-federal grounds to deny Petitioner's motion for reconsideration without deciding the alleged federal question.

The Court will not review a decision of a state court which rests upon adequate and independent non-federal grounds. ***Bell v. Maryland***, 378 U.S. 226, 12 L.Ed.2d 822, 84 S.Ct. 1814, on remand 236 Md. 356, 204 A.2d 54 (1964); ***Smith v. Smith***, 366 U.S. 210, 6 L.Ed.2d 233, 81 S.Ct. 1050 (1961); ***Radio Station WOW v. Johnson***, 326 U.S. 120, 128, 65 S.Ct. 1475, 1480, 89 L.Ed. 2092 (1942).

1. The Court Lacks Jurisdiction To Consider This Petition Because Petitioner Failed To Properly Raise A Federal Question At Trial And On Appeal.

The Supreme Court of Hawaii did not have to decide Petitioner's alleged federal question because it was never raised at trial nor on appeal. Although there is no specific time prescribed to raise a federal issue in the state court, the failure to timely raise a federal issue constitutes a waiver of that point and serves as an adequate, independent state ground for the decision and bars review by this Court.

In ***Street v. New York***, 394 U.S. 576, 582, 22 L.Ed.2d 572, 89 S.Ct. 1354 (1969), the Court held,

> Moreover, this Court has stated that when as here, the highest state court has failed to expressly pass upon a federal question, it is assumed that the omission was due to a failure to properly present the federal question in the state courts, unless the appellant or petitioner in the United States Supreme Court can affirmatively show to the contrary.

The Court in ***William v. Georgia***, 349 U.S. 375, 382-383, 99 L.Ed 1161, 75 S.Ct. 814 (1955) declared, "[A] state procedural rule which forbids the raising of federal questions at a late stage in the case, or by any other than a prescribed method, has been recognized as a valid exercise of state power."

Failure to present a federal question in conformance with state procedure constitutes an adequate and independent ground of decision barring review in this Court. ***Michigan v. Tyler***, 436 U.S. 499, 512, n. 7, 56 L.Ed.2d 486, 98 S.Ct. 1942 (1978); ***Louisville & N. R. C. v. Woodford***, 234 U.S. 46, 51, 58 L.Ed. 1202, 34 S.Ct. 739 (1914) (The Court lacked jurisdiction when the federal issue was raised for the first time in the appellate court without bringing it to the attention of the trial court); ***Fair Haven & W.R. Co. v. New Haven***, 203 U.S. 379, 51 L.Ed 237, 27 S.Ct. 74 (1906); ***Erie R. Co. v. Purdy***, 185 U.S. 148, 46 L.Ed 847, 22 S.Ct. 605 (1902); ***Brown v. Massachusetts***, 144 U.S. 573, 579-580, 36 L.Ed. 546, 12 S.Ct. 757 (1892) (Procedural defaults resulted in waiver of the federal question where state practice did not permit raising an issue in a post-trial motion).

The Hawaii courts have consistently held that the failure to raise an issue in the trial court is a waiver of that issue on appeal. ***Airgo, Inc. v. Horizon Cargo Transport, Inc.***, 66 Hawaii. 590, 596, 670 P.2d 1277 (1983) (Question not properly raised in the trial court will be deemed waived on appeal); ***Hana Ranch, Inc. v. Kaholo***, 2 Hawaii Ct. App. 329, 332, 632 P.2d 293 (1981); ***Emma Ah Ho v. Cobb***, 62 Hawaii 546, 555, 617 P.2d 1208 (1980); ***House v. Ane***, 56 Hawaii 383, 391, 538 P.2d 320 (1975); ***State v. Robinson***, 50 Hawaii 501, 502, 443 P.2d 140 (1968).

The alleged federal question was never raised at trial but was first raised in Petitioner's motion for reconsideration, which the Supreme Court of Hawaii denied without deciding the due process claim. The Court lacks jurisdiction to consider the Petitioner's petition for a writ of certiorari.

2. The Petitioner's Motion For Reconsideration Alleged A New Issue Which Is Prohibited Under Hawaii Appellate Rules.

The Petitioner improperly raised a new issue when she alleged a federal question in her motion for reconsideration. The Hawaii Rules of Appellate Procedure, Rule 40(b), states:

> Motion for Reconsideration.
>
> Contents. The motion shall state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised. The motion shall also be supported by a certificate of counsel to the effect that it is presented in good faith and not for purposes of delay.

The Supreme Court of Hawaii has consistently limited reconsideration to only matters properly raised at trial. In ***Wunderberg v. Campbell***, 9 Hawaii 211, 212 (1893), the Supreme Court of Hawaii held, "A rehearing will not be granted on a point not raised on first hearing"; ***Associate Engineers & Contractors, Inc. v. State***, 58 Hawaii 322, 322, 568 P.2d 512 (1977) (A question not previously raised on appeal will not ordinarily be considered in a petition for rehearing); ***Lalakea v. Laupahoehoe Sugar Co.***, 35 Hawaii 349, 351 (1940);

Dillingham v. Scott, 20 Hawaii 4, reh'g denied 20 Hawaii 55 (1910).

The Petitioner violated the rule limiting matters in a motion for reconsideration. The Supreme Court of Hawaii did not have to decide the Petitioner's federal question and properly denied the motion for reconsideration.

3. Petitioner Did Not Allege A Federal Question As A Point On Appeal So The Hawaii Supreme Court Was Free To Disregard This Issue.

The Petitioner did not allege any federal question as a point on appeal to the Supreme Court of Hawaii. (See Petitioner's Opening Brief at Appendix A199-A203). Petitioner's failure to adhere to this procedural requirement provided another non-federal basis for the Hawaii Supreme Court to deny the motion for reconsideration.

In *Webb v. Webb*, 451 U.S. 493, 498, n. 4, 68 L.Ed.2d 392, 101 S.Ct. 1889 (1981), the Court noted,

> Even if, as a matter of federal law, petitioner had properly raised her federal question, we might still confront here an independent state procedural ground barring our consideration of the federal issue.
>
> Rule 45 of the Rules of the Georgia Supreme Court states: "Any enumerated error which is not supported by argument or citation of authority shall be deemed abandoned." Ga. Code § 24-4545 (Supp. 1980). The Georgia court held that failure to include citations of authority to support enumerated errors will bar review of those errors in the State Supreme Court. *Watts v. Mitchell*, 227 Ga. 247, 179 S.E.2d 774 (1971).

The petitioner in ***Webb*** failed to raise a federal claim in the state court which precluded jurisdiction. The Court also found that the state's rule provided another legitimate basis to deny jurisdiction.

The Petitioner in this case did not raise a federal question at trial, therefore, could not identify this as a point on appeal. The Supreme Court of Hawaii did not decide the alleged federal question because it was never raised at trial and could not be designated as a point on appeal.

Rule 28(b)(4) of the Hawaii Rules of Appellate Procedure requires:

> (4) A concise statement of the points on which appellant intends to rely, set forth in separate, numbered paragraphs. Each point shall refer to the alleged error committed by the court or agency upon which appellant intends to rely. The point shall show where in the record the alleged error occurred and where it was objected to and, where applicable the following: . . .
>
> > (B) When the point involves the charge of the court, there shall be set out the specific words of the part referred to, whether it be instructions given or refused, together with the objections urged at the trial.
> >
> > (C) When the point involves findings or conclusions of the court below, those urged as error shall be quoted in their entirety and there shall be included a statement explaining why the finding of fact or conclusions of law were alleged to be erroneous.

The Supreme Court of Hawaii has refused to consider matters not properly raised as points on appeal. ***Hong v. Kong***, 67 Hawaii 15, 675 P.2d 769 (1984) (For

Substantial noncompliance with the rule governing appellate briefs, sanctions up to and including dismissal of the appeal will be levied); ***Lau v. Valu-Bilt Homes, Ltd.***, 59 Hawaii 283, 299, 582 P.2d 195 (1978) (Where appellant's opening brief failed to set forth concise statement of points on which he intends to rely, the Supreme Court may decline to consider such matters); ***Galdeira v. Robert's Hawaii Tour, Inc.***, 4 Hawaii Ct. App. 175, 180, 664 P.2d 262 (1983); ***John Wilson Enterprises, Ltd. v. Carrier Terminal Services, Inc.***, 2 Hawaii Ct. App. 128, 131 (1981) (Argument that the court's findings were inadequate to support a judgment against individual corporate officers, could not be considered on appeal when it was not raised in either the questions presented nor as points on appeal).

Petitioner did not raise a federal question at trial and could not allege any federal question as a point on appeal. The Supreme Court of Hawaii had several non-federal grounds to deny Petitioner's motion for reconsideration without deciding the alleged federal question.

C. THE JURY FOUND BY A CLEAR AND CONVINCING EVIDENCE THAT PETITIONER 1) ACTIVELY PARTICIPATED IN THE FRAUD AND 2) WAS SUBJECT TO PUNITIVE DAMAGES. PETITIONER'S DUE PROCESS RIGHTS WERE PROTECTED.

"The touchstone of due process is protection of the individual against arbitrary action of government". ***Daniels v. William***, 474 U.S. 327, 331, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986), quoting ***Dent v. West Virginia***, 129 U.S. 114, 123, 9 S.Ct. 231, 32 L.Ed. 623 (1989). Petitioner's due process rights were not violated by either the trial court nor the Supreme Court of Hawaii.

The jury received comprehensive jury instructions and assessed punitive damages based on a finding of fraud by "clear and convincing evidence". The trial court and Supreme Court of Hawaii reviewed the jury verdict. The Supreme Court of Hawaii found there was "[A]bundant circumstantial evidence to support a verdict of fraud, . . . " (Memorandum Opinion at A40).

The courts also found that Kamisugi waived any objection to the jury instructions and verdict form. Notwithstanding these waivers, the instructions and special verdict form were correct statements of the law and consistent with the ruling of the trial court. "The due process clause of the Fourteenth Amendment does not impose on the states a duty to establish ideal systems for the administration of justice, with every modern improvement, and with the provision against every possible hardship that may befall." ***Ownbey v. Morgan***, 256 U.S. 94, 110, 41 S.Ct. 433, 65 L.Ed. 837 (1921).

In ***Pacific Mutual Life Insurance Co. v. Haslip***, 499 U.S. ___, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991), the Court held that a punitive damage award did not violate the Due Process Clause of the Fourteenth Amendment. The trial court returned a verdict of more than $1 million against petitioner, Pacific Mutual and Ruffin, its agent.[1]

Pacific Mutual argued that when punitive damages were imposed on Pacific Mutual, "[T]he focus for determining the amount of those damages were shifted from Ruffin, where it belongs, to Pacific Mutual, and obviously and unfairly contributed to the amount of the punitive

---

[1]In Alabama, punitive damages are not apportionable among joint tortfeasors. ***General Motors Corp. v. Edwards***, 482 So. 2d 1176 (Ala, 1985).

damages and their disproportionality". 499 U.S. at ___, 111 S.Ct. at 1040.

The Court held that:

> Alabama's common-law rule is that a corporation is liable for both compensatory and punitive damages for fraud of its employee effected within the scope of his employment. We cannot say that this does not rationally advance the State's interest in minimizing fraud. . .
>
> Imposing exemplary damages on the corporation when its agent commits intentional fraud creates a strong incentive for vigilance by those in a position to guard substantially against the evil to be prevented. . . Imposing liability without independent fault deters fraud more than a less stringent rule. It therefore rationally advances the State's goal. We cannot say this is a violation of Fourteenth Amendment due process. 499 U.S. at _____, 111 S.Ct. at 1041.

The Court acknowledged the jury had "significant discretion" to award punitive damages, but this discretion was not unlimited, it was confined to deterrence and retribution. The Court held that, "As long as the discretion is exercised within reasonable constraints, due process is satisfied". 492 U.S. at ____, 111 S.Ct. 1044.

The Court ruled that Pacific Mutual had the full panoply of the state's procedural protection through the jury instructions, the trial court's post-trial hearing and also by the Supreme Court of Alabama's review of the judgment.

Petitioner attempts an argument similar to Pacific Mutual's that the "wrongdoing" of the Company was improperly ascribed to her. However, the jury found by

clear and convincing evidence that Kamisugi, as president, director and sole stockholder of the Company, actively participated in the fraud. It was her active participation and not her being listed with her Company, in the jury instructions and on the verdict form, which formed the basis for assessing punitive damages.

There was no violation of Petitioner's substantive due process rights. The State of Hawaii has a rational objective to prevent fraud by real estate agents and brokers. Hawaii Revised Statute § 467-14 provides for the revocation of a [real estate] license for making misrepresentations and any other fraudulent or dishonest conduct. (Appendix H for Appendix F, A172). In this case, the jury was also properly instructed that the purpose of punitive damages was to punish and deter others from similar acts. ***Masaki v. General Motors***, 71 Hawaii 1, 12, 780 P.2d 566 (1989).

The jury was instructed that the standard of proof to award punitive damages was by "clear and convincing evidence". ***Masaki*** at 16. As required by ***Pacific Mutual Life Ins.***, the Petitioner also had the "full panoply" of procedural safeguards to protect her due process rights.

In ***Browning-Ferris Industries v. Kelco Disposal, Inc.***, 492 U.S. 257, 278, 109 S.Ct. 2909, 106 L.Ed.2d 219 (1989), the Court held, "In a diversity action, or in any other lawsuit where state law provides the basis of decision, the propriety of an award of punitive damages for the conduct in question, and the factors the jury may consider in determining their amount, are questions of state law." (emphasis added).

1. Kamisugi Actively Participated In The Fraud And Concealed Material Information From Her Clients.

Contrary to Petitioner's claim that there was no evidence to justify punitive damages, the clear and convincing evidence established that Petitioner knew but concealed material facts from the Kuhnerts. The deliberate nondisclosures by Kamisugi constituted affirmative evidence of fraud.

Normally, the Court will not grant certiorari to review a decision that turns solely upon an analysis of facts or to determine whether the evidence support a judgment. ***General Talking Pictures Corp. v. Western Electric Co.***, 304 U.S. 175, 178-179, 82 L.Ed. 1273, 58 S.Ct. 849 (1938) (A writ of certiorari would not be warranted merely to review the evidence or inferences drawn from it); ***National Labor Relations Board v. Pittsburgh Steamship Co.***, 340 U.S. 498, 503, 71 S.Ct. 453, 95 L.Ed.2d 479 (1951),

> This is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other, though fair-minded judges could find it tilting either way. . . . In such situations we should 'adhere to the usual rule of noninterference with conclusions of Circuit Courts of Appeals depend on appreciation of circumstances which admit of different interpretations'."

The trial court and Supreme Court of Hawaii upheld the judgment applying the standard of "clear and convincing evidence". ***Masaki v. General Motors***, 71 Hawaii 1, 780 P.2d 566 (1989). The Hawaii courts applied this higher standard although the Court in ***Pacific Mutual Life Ins. Co.*** found the lesser standard acceptable. In footnote 11 the Court stated:

> There is much to be said in favor of a State's requiring, as many do, (citation omitted), a standard of "clear and convincing evidence" or, even, "beyond a reasonable doubt," (citation omitted), as in the criminal context. We are not persuaded, however, that the Due Process Clause requires that much. We feel that the lesser standard prevailing in Alabama--"reasonably satisfied from the evidence"--when buttressed as it is, by the procedural and substantive protections outlined above, is constitutionally sufficient. 449 U.S. at _____ 111 S. Ct. at 1046.

The jury assessed punitive damages against each Defendant to punish and deter similar conduct. In ***Lauer v. Young Men's Christian Association of Honolulu***, 57 Hawaii 390, 402, 557 P.2d 1334 (1976), the court held, "The deterrent or retributive effect of punitive damages must be placed squarely on the shoulders of the wrongdoer. A wrongdoer in this context includes a person superior in authority to expressly authorize, ratify or condone the tortious act of the employee".

The trial court denied the Petitioner's post-trial motions for judgment notwithstanding the verdict, new trial and for a total remittitur of damages. The trial court stated, "The court also finds that there is substantial evidence, direct and circumstantial, to support the verdict with respect to liability, compensatory and punitive damages of the defendants". (Appendix D for Appendix G at A241). The Supreme Court of Hawaii also held, "[T]here was abundant circumstantial evidence to support a verdict of fraud, . . ." (Memorandum Opinion at A40).

2. There Is No Bar To A Joint Punitive Damage Award Against The President And Her Corporation For Her Intentional Torts.

There is no rule preventing punitive damages from being jointly assessed against a corporate officer and corporation, when the officer directly participated in the wrongdoing. ***Tyler v. Savage***, 143 U.S. 79, 98, 36 L.Ed. 82, 12 S.Ct. 340 (1892) (A director or officer of a corporation is individually liable for fraudulent acts or false representations of his own or in which he participates).

In ***Lake Shore & Michigan Southern Railway Company v. Prentice***, 147 U.S. 101, 114, 13 S.Ct. 261, 265, 37 L.Ed. 97 (1893), the Court held,

> The president and general manager, or, in his absence, the vice president in his place, actually wielding the whole executive power of the corporation, may well be treated as so far representing the corporation and identified with it that any wanton, malicious, or oppressive intent of his, in doing wrongful acts in behalf of the corporation to the injury of others, may be treated as the intent of the corporation itself.

In ***Eastern Star, Inc. v. Building Materials Corp.***, 6 Hawaii Ct. App. 125, 712 P.2d 1148 (1985), the Hawaii court held that a corporation and its corporate officers could be held jointly and severally liable where they participated in the tortious conduct and they are not shielded by the corporation and will be personally liable, both civilly and criminally.

The trial court correctly instructed the jury that the Company would be vicariously liable for Kamisugi's acts if there was clear and convincing evidence that Kamisugi

authorized, approved, ratified or participated in the wrongful acts. (Jury Instruction 18, Appendix A168).

In this case, the jury individualized liability for each Defendant's conduct and awarded punitive damages in differing amounts to punish the wrongdoer and deter others. (Jury Instruction Number 43, Appendix A171). Kamisugi was found liable and assessed punitive damages for her own misconduct.

3. The Court Need Not Reconcile The Different State Views On Evidence Of The Wealth Of Multiple Defendants When Punitive Damages Are Awarded.

The courts are divided as to whether evidence of the financial worth of one or more joint tortfeasors may or may not be presented at trial. Some jurisdictions hold that no evidence of wealth may be presented when punitive damages are sought. Anno. ***Financial Worth of One or More of Several Joint Defendants as Proper Matter for Consideration in Fixing Punitive Damages***, 9 ALR 3d. 692.

However, other courts permit evidence of financial condition even though there are multiple defendants. The concern is, that otherwise a wealthy defendant, who was principally implicated in the wrong might escape paying her just and reasonable damages if others without property are associated with the unlawful act. ***Bell v. Morrison***, 27 Miss. 68 (1868)

Petitioner cites ***Washington Gas Light Co. v. Landsen***, 172 U.S. 534, 553, 19 S.Ct. 296, 43 L.Ed 543 (1899) for the proposition that she should not have been listed with the Company because the Company's "wealth" biased the jury when it awarded punitive damages.

In ***Washington Gas Light***, the jury had returned a single verdict with one punitive damage award against three individuals and one corporate defendant. The Court reversed the judgment against two individual defendants and there was only one remaining defendant with the corporation. Under these particular circumstances, the Court held:

> While all defendants joined are liable for compensatory damages, there is no justice in allowing the recovery of punitive damages in an action against several defendants, based upon evidence of the wealth and ability to pay such damages on the part of one of the defendants only... This rule does not prevent the recovery of punitive damages in all cases where several defendants are joined. What the true rule is in such case is not perhaps certain. (citation omitted). But we have no doubt it prevents evidence regarding the wealth of one of the defendants as a foundation for computing or determining the amount of such damages against all. 174 U.S. at 553. (emphasis added).

This case is clearly distinguishable and the principle of ***Washington Gas Light*** is inapposite. Kamisugi is not the only individual defendant remaining with the Company and there was no single punitive damage award against all the Defendants. Instead, all of the Defendants were found liable and each was assessed punitive damages in different amounts. Evidence of the wealth or the lack of wealth of each Defendant was presented to the jury.

The Supreme Court of Hawaii in ***Jendrusch v. Abbott***, 39 Hawaii 506 (1952) had the opportunity to, but chose not to apply the principle enunciated in ***Washington Gas Light***. The Supreme Court of Hawaii could also have

applied the rule of *Washington Gas Light* to this case, but also chose not to do so.

4. Kamisugi Was Listed With The Company Because The Trial Court Ruled The Company Would Be Vicariously Liable For Her Torts. Kamisugi Waived Any Objection To This Joint Listing.

The jury was properly instructed on breach of fiduciary duty and Kamisugi was not vicariously liable for the breach by Allison or the Company. (Jury Instruction 31, Appendix A117). The jury instruction correctly stated the law and it was stated in the alternative, so the jury could decide who, if any, breached their fiduciary duty. The jury was also instructed that each Defendant was entitled to fair and unbiased treatment, whether an individual or a corporation. (Jury Instruction 4, Appendix A165). The jury then specified on the verdict form whether Clyde Allison or Libbie Kamisugi or both breached their fiduciary duty to the Kuhnerts.

The jury was not confused nor biased because Kamisugi was listed with the Company. The jury was instructed that officers of a corporation who commit fraud are personally liable. (Jury Instruction Number 21, Appendix A168). A corporate agent is individually liable for tortious acts performed in the scope of her employment. It is not necessary that the "corporate veil" be pierced in order to impose personal liability, as long as it is shown that the corporate officer knowingly participated in the wrongdoing. ***Barclay v. Johnson***, Tex. App. 1 Dist., 686 S.W.2d 334, 337 (1985);. Liability did not flow from the acts of the Company to Kamisugi, instead the Company was vicariously liable for the acts of Kamisugi.

Both the trial court and Supreme Court of Hawaii found that Kamisugi waived any objection to the instructions.

Hawaii Rules of Civil Procedure, Rule 51(e), which is similar to Federal Rule of Civil Procedure, Rule 51, provides, in pertinent part,

> No party may assign as error the giving or the refusal to give, or the modification of, an instruction, whether settled pursuant to subdivision (b) or subdivision (c), of this rule, unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection.

"A party will not be allowed on appeal to claim error in the giving of an instruction which was given by agreement." ***In re Estate of Coleman***, 1 Hawaii Ct. App. 136, 141, 615 P.2d 760 (1980); ***S & W Crane Service, Inc. v. Berard's Dependents***, 53 Hawaii 161, 489 P.2d 419 (1971); ***Okuhara v. Broida***, 51 Hawaii 253, 255, 456 P.2d 228 (1969).

The jury and trial court were not misled or confused by a "conspiracy theory", but understood that persons may be jointly liable when they act in concert with others to perpetrate a fraud. "One who participates in a fraud is of course guilty of fraud, and one who with knowledge of the facts, assists another in the perpetration of a fraud is equally guilty." ***Lincoln v. Claflin***, 7 Wall (U.S.) 132, 19 L.Ed. 106 (1868). The jury was never asked to find conspiracy. The verdict form was limited to the torts of fraudulent misrepresentation, fraudulent concealment and breach of fiduciary duty. (Appendix, A140).

In ***Ellis v. Crocket***, 51 Hawaii 45, 57, 451 P.2d 814, 822-23 (1969), the Hawaii Supreme Court held, "Although the tort of 'conspiracy' has not been clearly defined, it is clear that there can be no civil claim based upon a conspiracy alone." (emphasis added). ***See*** Prosser and Keaton, ***The Law of Torts*** § 46, at 324 (5th ed. 1984), "The gist of the action is not the conspiracy charged, but the [independent] tort working damage to the plaintiff".

The jury was instructed to consider the actions of each Defendant and if there was a common objective to defraud the Plaintiffs, then each Defendant could be liable for fraud. The jury instructions, when read as a whole, were proper instructions as to the elements of fraud and the required burden of proof by clear and convincing evidence. ***Armstrong v. Cione***, 6 Hawaii Ct. App. 652, 660-61, 736 P.2d 440 (1987) (Instructions must be read as a whole and if an omission or inaccuracy is cured by other instructions and correctly states the law, this will not constitute grounds for reversal).

In ***Atlantic and Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.***, 369 U.S. 355, 364, 82 S.Ct. 780, 7 L.Ed.2d 798 (1962), reh'g denied, 369 U.S. 882, 82 S.Ct. 1137, 8 L.Ed.2d 284 (1962), the Court held,

> Where there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way. For a search for one possible view of the case which will make the jury's findings inconsistent, results in a collision with the Seventh Amendment of the United States Constitution.

Kamisugi never objected to being listed with the Company on the verdict form. Objections to the form of a verdict for must be made before a jury retires and failure to

do so waives all objections. ***Peckham v. Continental Casualty Co.***, 895 F.2d 830 (1st Cir. 1990); ***Geosearch, Inc. v. Howell Petroleum Corp.***, 819 F.2d 521 (5th Cir. 1987). ***Latuso v. Uniroyal Inc.***, 783 F.2d 1241 (5th Cir. 1986); ***Pielet v. Pielet***, 686 F.2d 1210 (7th Cir. 1982) cert. denied, 459 U.S. 1107, 103 S.Ct. 733, 74 L.Ed.2d 957 (1983); ***J.C. Motor Lines, Inc. v. Trailways Bus Systems, Inc.***, 689 F.2d 599 (5th Cir. 1982); ***Nimnicht v. Dick Evans, Inc.***, 477 F.2d 133 (5th Cir. 1973).

The Hawaii Rules of Civil Procedure, Rule 49(a), which is identical to the Federal Rules of Civil Procedure, Rule 49(a), and provides in part,

> Special Verdicts.
>
> ... The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

Kamisugi also had a second opportunity to object to the verdict form or ask for a clarification of the award, when the jury returned with its verdict, but failed to do so and instead allowed the jury to be discharged. ***Lockard v. Missouri Pac. R.R.***, 894 F.2d 299 (8th Cir. 1990); ***Cundiff v. Washburn***, 393 F.2d 505 (7th Cir. 1968). The Petitioner waived any objections concerning the verdict

form and instructions. Petitioner's due process rights were not violated.

CONCLUSION

For the foregoing reasons, the Court should deny the petition for certiorari.

Dated: Honolulu, Hawaii, July 17, 1992.

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NO. 14956

IN THE SUPREME COURT OF THE STATE OF HAWAII

HEINZ KUHNERT and SHERILYN MARIE KUHNERT, Plaintiffs-Appellees, Cross-Appellants, vs. CLYDE H. ALLISON, LIBBIE & COMPANY, INC., a Hawaii Corporation, MARION LIBBIE KAMISUGI, DARLENE M. OSTERMAN, HERBERT DAVID OSTERMAN, Defendants-Appellants, Cross-Appellees, and	CIVIL NO. 88-3197 APPEAL AND CROSS-APPEAL FROM THE: (1) JUDGMENT FILED AUGUST 7, 1990; (2) ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION FOR PRE-JUDGMENT INTEREST FILED ON SEPTEMBER 6, 1990, ENTERED ON OCTOBER 18, 1990; (3) FIRST AMENDED NOTICE OF TAXATION OF COSTS; BILL OF COSTS FILED SEPTEMBER 20, 1990 (4) ORDER DENYING DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON THE ISSUE OF FRAUD FILED ON APRIL 9, 1990, FILED MAY 21, 1990

and

JOHN DOE 1-5, DOE CORPORATION 1-5, DOE PARTNERSHIP 1-5, AND DOE GOVERNMENTAL ENTITY 1-5,

Defendants.

(5) FIRST AMENDED JUDGMENT FILED OCTOBER 18, 1990;

(6) ORDER DENYING IN PART AND GRANTING IN PART DEFENDANT CLYDE H. ALLISON, LIBBIE & COMPANY,INC., DARLENE M. OSTERMAN AND HERBERT DAVID OSTERMAN'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR, IN THE ALTERNATIVE FOR NEW TRIAL OR REMITTITUR FILED JULY 27, 1990, FILED ON SEPTEMBER 6, 1990, DEFENDANT MARION LIBBIE KAMISUGI'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT RENDERED ON JUNE 19, 1990, OR IN THE ALTERNATIVE FOR A NEW TRIAL OR REMITTITUR FILED ON JULY 27, 1990, AND DEFENDANT MARION LIBBIE KAMISUGI'S

) AMENDED MOTION
) FILED ON AUGUST 20,
) 1990, FILED OCTOBER
) 18, 1990
)
) FIRST CIRCUIT COURT
)
) HONORABLE ROBERT
) G. KLEIN HONORABLE
) PHILIP T. CHUN
) HONORABLE TENNEY
) TONGG
) HONORABLE LELAND
) H. SPENCER
) Judges
) JUDGMENT ON
) APPEAL

JUDGMENT ON APPEAL

Pursuant to Memorandum Opinion of the Supreme Court of Hawaii entered herein on March 13, 1992, the First Amended Judgment of the Circuit Court of the First Circuit entered on October 18, 1990, is affirmed.

Dated: Honolulu, Hawaii, March 25, 1992.

BY THE COURT:

/s/ Sandra N. Yasui
Its Clerk

APPROVED:

/s/ Frank D. Padgett
JUSTICE OF THE COURT

NO. 14956

IN THE SUPREME COURT OF THE STATE OF HAWAII

HEINZ KUHNERT and SHERILYN MARIE KUHNERT,	)	CIVIL NO. 88-3197
Plaintiffs-Appellees, Cross-Appellants,	)	MOTION FOR RECONSIDERATION
vs.	)	
CLYDE H. ALLISON, LIBBIE & COMPANY, INC., a Hawaii Corporation, MARION LIBBIE KAMISUGI, DARLENE M. OSTERMAN, HERBERT DAVID OSTERMAN,	)	
Defendants-Appellants, Cross-Appellees,	)	
and	)	

JOHN DOE 1-5; DOE)
CORPORATION 1 -5;)
DOE PARTNERSHIPS 1-)
5; DOE)
GOVERNMENTAL)
ENTITIES 1-5)
)

ORDER DENYING MOTION FOR RECONSIDERATION

Upon consideration of appellant Marion Libbie Kamisugi's motion for reconsideration filed March 23, 1992, the joinder of appellants Darlene and Herbert Osterman filed the same day, the joinder of appellants Clyde Allison and Libbie & Company (filed one day late), the memoranda in support thereto, and the record below,

IT IS HEREBY ORDERED that the motion and the joinders to the motion are hereby denied.

Dated: Honolulu, Hawaii, March 25, 1992.

/s/ Herman Lum
/s/ Frank D. Padgett
/s/ Yoshimi Hayashi
/s/ James Wakatsuki
/s/ James S. Burns

William C. McCorriston, Jerrold Y. Chun, and John Y. Yamano (McCorriston Miho & Miller) on the motion for Kamisugi

Paul A. Lynch and Lyle M. Ishida (Case & Lynch) on the joinder for the Ostermans

James A. Wagner and Lloyd J. Hochberg, Jr. (Wagner & Watson, of counsel) on the joinder for Allison and Libbie & Company

NO. 14956

IN THE SUPREME COURT OF THE STATE OF HAWAII

HEINZ KUHNERT and SHERILYN MARIE KUHNERT,	)	CIVIL NO. 88-3197
Plaintiffs-Appellee,	)	APPEAL FROM THE (1) JUDGMENT ENTERED ON AUGUST 7, 1990; (2) "FIRST AMENDED JUDGMENT" ENTERED ON OCTOBER 18, 1990; (3) "ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION FOR PRE-JUDGMENT INTEREST FILED ON SEPTEMBER 6, 1990," ENTERED ON OCTOBER 8, 1990; (4) "ORDER DENYING IN PART AND GRANTING IN PART DEFENDANT CLYDE H. ALLISON, LIBBIE & COMPANY, INC., DARLENE M. OSTERMAN AND HERBERT DAVID OSTERMAN'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR, IN THE ALTERNATIVE FOR NEW TRIAL OR REMITTITUR FILED JULY 27, 1990;
vs.	)	
CLYDE H. ALLISON, LIBBIE & COMPANY, INC., a Hawaii Corporation, MARION LIBBIE KAMISUGI, DARLENE M. OSTERMAN, HERBERT DAVID OSTERMAN, John Doe 1-5, Doe Corporation 1-5, Doe Partnership 1-5, And Doe Governmental Entity 1-5,	)	
Defendants-Appellant.	)	

) DEFENDANTS CLYDE
) H. ALLISON, LIBBIE &
) COMPANY, INC.,
) DARLENE OSTERMAN
) AND HERBERT DAVID
) OSTERMAN'S
) SUPPLEMENTAL
) MEMORANDUM IN
) SUPPORT OF THEIR
) MOTION FILED JULY
) 27, 1990, FILED ON
) AUGUST 20, 1990;
) SUPPLEMENTAL
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) KAMISUGI'S MOTION
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) DEFENDANT MARION
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) HONORABLE LELAND
) H. SPENCER

APPELLANT MARION LIBBIE KAMISUGI'S MOTION FOR RECONSIDERATION

Appellant MARION LIBBIE KAMISUGI, by and through her attorneys, McCorriston Miho & Miller, hereby moves this Court to reconsider its opinion filed March 13, 1992, affirming a million dollar judgment[1] against Kamisugi on the grounds that the opinion overlooked or misapprehended the following points of law and fact:

(1) KAMISUGI'S CHALLENGE TO THE ERRONEOUS SUBMISSION OF THE DEFECTIVE SPECIAL VERDICT WAS CLEARLY MISAPPREHENDED.[2]

The Memorandum Opinion mistakenly states: "Appellant Kamisugi, in her points of error, urges that the trial court erred in submitting the special verdict form to the jury because it was legally incorrect and confusing, and led to **double recovery.**" (Emphasis added). Memorandum Opinion, p. 4. Although there is no question that the Special Verdict was legally incorrect and confusing, Kamisugi never argued that she was the victim of "double recovery."[3]

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[1]The First Amended Judgment against Kamisugi totals $948,360.00 plus post judgment interest.

[2]See Kamisugi's Point on Appeal "A".

[3]This Court's misapprehension of Kamisugi's point of error apparently came from its review of the trial court transcripts. During the underlying trial, counsel for defendants expressed concern that the Special Verdict allowed the possibility of "double recovery" from Libbie & Company with respect to punitive damages. (Tr. 6/15/90:20-22). The concern was based on the duplicate listing of Libbie & Company on the Special Verdict. See Appendix A to Kamisugi's Opening Brief.

Kamisugi did not raise this argument on appeal. Indeed, it would be nonsensical for Kamisugi to claim "double recovery" since it was Libbie & Company, not Kamisugi, who was listed twice.

This confusion between Kamisugi, the individual, and Libbie & Company, the real estate firm owned by Kamisugi, is significant. Throughout

As set forth in her appellate briefs, Kamisugi specifically argued that the submission of the Special Verdict was erroneous because: a) the Special Verdict prevented the jury from applying the evidence and law to Kamisugi individually, thereby allowing the jury to assess punitive damages against Kamisugi based on the conduct and financial status of Libbie & Company; b) the Special Verdict resulted in the assessment of joint and several liability against Kamisugi and Libbie & Company for punitive damages; and c) the Special Verdict allowed the jury to assess punitive damages against Kamisugi based upon vicarious liability for the acts of Libbie & Company. See Kamisugi's Opening Brief, p. 8. Kamisugi's arguments and legal authorities were not touched upon in the Memorandum Opinion.

(2) THE DOCTRINE OF "PLAIN ERROR" WAS NOT PROPERLY ADDRESSED BY THIS COURT.

As evidenced by the Memorandum Opinion, this Court recognized at least two obvious errors made by the trial court: (a) "the somewhat complicated problems with respect to punitive damages" arising from the Special Verdict; and (b) the submission of the erroneous "conspiracy" instruction to the jury. However, the Memorandum Opinion fails to address the second prong of the plain error doctrine - the miscarriage of justice arising from the recognized errors. Turner v. Willis, 59 Haw. 319, 324, 582 P.2d 710, 714 (1978). The erroneous Special Verdict has led to an unprecedented award of punitive damages. It is uncontroverted that punitive damages require a finding of "clear and convincing" evidence of wilful and wanton misconduct by the individual assessed with punitive damages. Moreover, the assessment of punitive damages

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the trial process Kamisugi was prejudiced because she was treated as if she were interchangeable with Libbie & Company. This Court's own confusion between arguments relevant to Libbie & Company and those raised by Kamisugi highlights the ongoing prejudice to Kamisugi, the individual.

must be based on the consideration of that individual's conduct and financial resources. Here, Kamisugi was assessed with joint and several liability for punitive damages by a jury which was forced to consider the conduct and financial resources of both Kamisugi and Libbie & Company. The manifest injustice arising from the erroneous jury instructions, particularly the conspiracy instruction, is equally clear. See Kamisugi's Point on Appeal "J". The Memorandum Opinion states that "it is likely that the trial judge, had the instruction been objected to, would have refused it at the time instructions were settled, . . . " Memorandum Opinion, p. 5. However, the Memorandum Opinion fails to address the miscarriage of justice arising from the trial judge's stated reliance (twice) on a conspiracy theory where no such claim was ever pled by the Plaintiffs (Tr. 8/29/90:65-66; Appendix D to Kamisugi's Opening Brief) (Tr. 9/7/90:57; Appendix E to Kamisugi's Opening Brief). [4]

(3) THIS COURT MISAPPREHENDED THE SCOPE OF KAMISUGI'S RELATIONSHIP WITH THE RESPECTIVE PARTIES AND THE NATURE OF HER INVOLVEMENT WITH THE SUBJECT TRANSACTION.[5]

This Court failed to note the following undisputed facts which highlight the manifest injustice arising from the

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[4]During the hearings on the post trial motions, the trial judge stated: "The Court finds that all though (sic) the question is not an easy one, there was substantial evidence from which the jury could find that the defendants Clyde Allison, Libbie Kamisugi, Darlene and David Osterman conspired together to defraud the plaintiffs. . ." (Emphasis added). See Kamisugi's Appendix D.

The trial judge reaffirmed his reliance on a conspiracy theory when ruling on Kamisugi's motion for remittitur: "Turning to defendant Libbie Kamisugi, this Court finds that there was substantial evidence from which the jury could find that the defendants Clyde Allison, Libbie Kamisugi, Darlene and David Osterman conspired together to defraud plaintiffs. . ." (Emphasis added). See Kamisugi's Appendix E.

[5]See Kamisugi's Points on Appeal "B" - "H".

imposition of punitive damages against Kamisugi: (a) Libbie & Company had a real estate brokers license separate from the license of Kamisugi (R:Vl:1; R:Vl:27); (b) Kamisugi did not inspect the Ostermans' penthouse condominium with Clyde Allison (Tr. 5/16/90: 136-141); (c) Kamisugi did not provide specific input to the valuation of the Ostermans' penthouse condominium (Tr. 5/16/90: 136-140); (d) Kamisugi was not present at the June 23, 1983 meeting when the DROA was executed (Tr. 5/16/90:150-162; Tr. 6/6/90:142); (e) Kamisugi did not prepare the subject DROA for signature by the parties (Tr. 5/16/90 :150-162; Tr. 6/6/90:142); and (f) Kamisugi did not review the DROA until the fully executed DROA was presented to her at the Waikiki Yacht Club (Tr. 5/22/90: 32-65).

The Memorandum Opinion fails to identify any evidence, whether direct or circumstantial, which could possibly support the outrageous verdict against Kamisugi. Instead, the Memorandum Opinion merely concludes that "there was abundant circumstantial evidence to support a verdict of fraud." (Emphasis added) . Memorandum Opinion, p. 4 . This reference to "circumstantial" evidence parallels the trial court 's determination that Kamisugi 's liability could be justified only through the existence of a "conspiracy. " See Paragraph (2) above. The admittedly erroneous conspiracy instruction was defective in two respects. First, it failed to mention that the "conspiracy" had to be for an unlawful purpose. Second, it failed to instruct the jury that the standard of proof for conspiracy is clear and convincing evidence.

It is unprecedented that punitive damages be imposed on an individual based merely upon circumstantial evidence, absent "clear and convincing" evidence of participation by that individual in wilful and wanton misconduct.

(4) THE IMPOSITION OF PUNITIVE DAMAGES AGAINST KAMISUGI, UNDER THE CIRCUMSTANCES OF THIS CASE, DEPRIVES KAMISUGI OF PROPERTY WITHOUT DUE PROCESS OF LAW IN VIOLATION OF BOTH THE UNITED STATES AND HAWAII CONSTITUTIONS.

Both the United States and Hawaii Constitutions specifically prohibit the state from "depriv[ing] any person of life, liberty, or property, without due process of law[.]" U.S. Const. amend. XIV, Sec. 1; see also Hawaii Const. art. I, Sec. 5. Under the circumstances of this case, the award of punitive damages, jointly and severally, against Kamisugi and Libbie &-Company clearly deprives Kamisugi of property without due process of law in violation of the federal and state constitutions.

This motion is made pursuant to Rule 40 of the Hawaii Rules of Appellate Procedure and is based upon the memorandum of law and certificate of good faith attached hereto, and the records and files in this case.

DATED: Honolulu, Hawaii, March 23, 1992.

/s/ John Y. Yamano
WILLIAM C. MCCORRISTON
JERROLD Y. CHUN
JOHN Y. YAMANO
Attorneys for Defendant
-Appellant
MARION LIBBIE KAMISUGI

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IN THE SUPREME COURT OF THE STATE OF HAWAII

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vs.	)	
CLYDE H. ALLISON, LIBBIE & COMPANY, INC., a Hawaii Corporation, MARION LIBBIE KAMISUGI, DARLENE M. OSTERMAN, HERBERT DAVID OSTERMAN, John Doe 1-5, Doe Corporation 1-5, Doe Partnership 1-5, And Doe Governmental Entity 1-5,	)	
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MEMORANDUM IN SUPPORT OF MOTION

I. INTRODUCTION

On March 13, 1992, this Court rejected Marion Libbie Kamisugi's plea for judicial relief from an unconscionable jury verdict. Kamisugi now faces personal liability for damages totaling $948,360.00, plus post judgment interest. See First Amended Judgment (R:V7:109). It is a gross miscarriage of justice to impose over $1 million in damages against Kamisugi where: (a) it is undisputed that she had no direct involvement in the procurement or consummation of the subject DROA; (b) the jury verdict was the result of a series of errors and omissions at the trial court; and (c) the Memorandum Opinion only concludes (without any specific factual or legal references) that "there was abundant circumstantial evidence to support a verdict of fraud" against Kamisugi.

Justice demands that this Court reconsider the Memorandum Opinion, and directly address the plethora of errors committed in the trial court which led to the outrageous verdict against Kamisugi. While some of these errors were acknowledged in the Memorandum Opinion (i.e "the somewhat complicated problems with respect to punitive damages" arising from the Special Verdict, and the erroneous "conspiracy" jury instruction which was not objected to at trial), the manifest injustice arising from such errors was ignored. Moreover, this Court failed to consider or misunderstood numerous facts and legal arguments that mandate a reversal of the trial court judgment.[6]

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[6]Kamisugi is hindered in her efforts to identify all of the facts and points of law which were misapprehended or overlooked by this Honorable Court because the opinion was rendered via a Memorandum Opinion which failed to specify the bases for the opinion. Nevertheless, the Memorandum Opinion contains several factual statements which undeniably reflect this Honorable Court's misunderstanding of the most significant points of error raised by Kamisugi.

II. STATEMENT OF UNDISPUTED FACTS

The abbreviated factual summary in the Memorandum Opinion fails to delineate Kamisugi's complete detachment from the negotiation and execution of the subject DROA which formed the basis for the fraud action against the defendants. In addition, the Memorandum Opinion evidences this Court's confusion between Kamisugi, the individual, and Libbie & Company, the real estate company owned by Kamisugi.

The following undisputed facts highlight the gross injustice arising from the judgment against Kamisugi:[7]

A. RELATIONSHIP BETWEEN THE KUHNERTS, CLYDE ALLISON. LIBBIE & COMPANY AND KAMISUGI.

The Kuhnerts owned the Nuuanu Property from 1979 through June 23, 1983. (Tr. 6/4/90:39). On August 23, 1982, the Kuhnerts entered into an exclusive listing agreement with Libbie & Company for the purpose of selling the Nuuanu Property. (Tr. 5/18/90:156; Tr. 6/4/90:76). Allison executed the exclusive listing agreement for Libbie & Company, which was licensed by the State of Hawaii to engage in the business of real estate sales and brokerage. (R:Vl:l; R:Vl:27). Kamisugi did not sign the Listing Contract. nor was she identified as the real estate broker on the Listing Contract. (Plaintiffs' Exhibit No. 9).

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[7]Kamisugi recognizes that the present motion for reconsideration is not a forum to repeat every fact and point of law raised in the briefs previously submitted to this Court. Accordingly, this memorandum will focus on those matters which this Court apparently overlooked or misapprehended. Kamisugi respectfully incorporates by reference the facts and points of law cited in her opening brief, reply brief, and answering brief (in the cross-appeal) filed with this Court.

B. KAMISUGI WAS NOT INVOLVED WITH THE MARKETING OF THE NUUANU PROPERTY TO THE OSTERMANS.

The record clearly established that Kamisugi did not participate in any of the telephone conversations between Allison and the Ostermans leading up to the Ostermans' inspection of the Nuuanu Property on June 21, 1983. Moreover, it is undisputed that Kamisugi did not attend the Ostermans' inspection of the Nuuanu Property on June 21, 1983. (Tr. 5/16/90:110-121).

Allison's inspection of the Ostermans' penthouse condominium (which was used as part of the transaction with the Kuhnerts) occurred on Wednesday, June 22, 1983. At that time, Allison discussed the estimated value of the Ostermans' penthouse condominium. (Tr. 5/16/90:136-141). It is undisputed that Kamisugi did not inspect the Ostermans' penthouse condominium with Allison, nor did she provide specific input to the valuation of the condominium. (Tr. 5/16/90:136-141).

C. KAMISUGI WAS NOT INVOLVED WITH THE PREPARATION OF THE DROA.

The signing of the DROA occurred at the meeting between Allison, the Ostermans and the Kuhnerts on June 23, 1983 at the Kuhnerts' Hawaii Kai home. (Tr. 5/16/90:150; Tr. 6/6/90:142). It was at that meeting when Allison prepared the DROA which was signed by Kuhnert and the Ostermans. (Tr. 5/16/90:162). It is undisputed that Kamisugi was not at the June 23, 1983 meeting and that she did not prepare the DROA for signature by the parties. (Tr. 5/16/90:150-162, Tr. 6/6/90:142).

III. DISCUSSION

A. KAMISUGI'S CHALLENGE TO THE ERRONEOUS SUBMISSION OF THE DEFECTIVE SPECIAL VERDICT WAS CLEARLY MISAPPREHENDED.

The Memorandum Opinion mistakenly states: "Appellant Kamisugi, in her points of error, urges that the trial court erred in submitting the special verdict form to the jury because it was legally incorrect and confusing, and led to **double recovery.**" Memorandum Opinion, p. 4. Although there is no question that the Special Verdict was legally incorrect and confusing, Kamisugi never argued that she was the victim of "double recovery."

In her respective appellate briefs, Kamisugi specifically argued that the submission of the Special Verdict was erroneous because: a) the Special Verdict prevented the jury from applying the evidence and law to Kamisugi individually, thereby allowing the jury to assess punitive damages against Kamisugi based on the conduct and financial status of Libbie & Company; b) the Special Verdict resulted in the assessment of joint and several liability against Kamisugi and Libbie & Company for punitive damages; and c) the Special Verdict allowed the jury to assess punitive damages against Kamisugi based upon vicarious liability for the acts of Libbie & Company. See Kamisugi's Opening Brief, p. 8. Kamisugi's arguments and legal authorities were not touched upon in the Memorandum Opinion.

This Court's misapprehension of Kamisugi's point of error apparently came from its review of the trial court transcripts whereby trial counsel for defendants expressed concern that the Special Verdict allowed the possibility of "double recovery" from Libbie & Company with respect to punitive damages. (Tr. 6/15/90:20-22). The concern was based on the duplicate listing of Libbie & Company on the Special Verdict. Kamisugi did not raise this argument on

appeal. Indeed, it would be nonsensical for Kamisugi to claim "double recovery" since it was Libbie & Company, not Kamisugi, who was listed twice.

This Court's confusion between arguments raised by Kamisugi, the individual, and those related to Libbie & Company, the real estate firm owned by Kamisugi, is significant. Throughout the trial process Kamisugi was prejudiced because she was not viewed independently from Libbie & Company. This Court's own confusion highlights the ongoing injustice incurred by Kamisugi, the individual.

B. THIS COURT FAILED TO PROPERLY APPLY THE PLAIN ERROR DOCTRINE.

The doctrine of "plain error" argued by Kamisugi and cited in the Memorandum Opinion was not fully addressed by this Court. It is widely recognized that a party's failure to make a timely objection at trial will not prohibit an appellate court from taking cognizance of the trial court's error "if the error is plain and may result in a miscarriage of justice." Turner v. Willis, 59 Haw. 319, 324, 582 P.2d 710, 714 (1978).

As evidenced by the Memorandum Opinion, this Court recognized at least two obvious errors made by the trial court: (a) "the somewhat complicated problems with respect to punitive damages" arising from the Special Verdict; and (b) the submission of the erroneous "conspiracy" instruction to the jury. However, this Court fails to address the second prong of the plain error doctrine - the miscarriage of justice arising from the recognized errors - which mandates a reversal of the judgment against Kamisugi.

The extreme prejudice caused by the Special Verdict cannot be ignored. It is uncontroverted that punitive damages require a finding of "clear and convincing" evidence of wilful and wanton misconduct by the individual assessed with punitive damages. Moreover, the assessment

of punitive damages must be based on the consideration of that individual's conduct and financial resources. Masaki v. General Motors, et al., 71 Haw. 1, 6, 780 P.2d 566, 570 (1989) (in assessing whether an award of punitive damages is appropriate with regard to a particular defendant, it is necessary to focus on actions of that defendant to determine: (1) his mental state; and (2) the nature of his conduct.) Because of the erroneous Special Verdict, Kamisugi was assessed with joint and several liability for punitive damages by a jury which was forced to consider the conduct and financial resources of both Kamisugi and Libbie & Company together. This "joint" assessment of punitive damages is unprecedented.[8] See Kamisugi's Opening Brief, pp. 15-20.

The manifest injustice arising from the erroneous jury instructions, particularly the conspiracy instruction, is equally clear. See Kamisugi's Point on Appeal "J". The Memorandum Opinion states that "it is likely that the trial judge, had the instruction been objected to, would have refused it at the time instructions were settled, . . . " Memorandum Opinion, p. 5. This Court attempted to minimize the significance of the error by explaining that "viewing the instructions as a whole, we find no plain error." Memorandum Opinion, p. 5. However, the prejudice arising from the conspiracy instruction goes much further than that recognized by this Court (i.e. one erroneous instruction which could be cured by the remaining instructions). The entire trial proceeding was

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[8]As argued by all appellants, punitive damages differ from compensatory damages in that punitive damages are awarded only to punish the wrongdoer. Hence, joint and several liability for punitive damages is inherently inconsistent with the purpose of punitive damages. These reasons for awarding punitive damages make it improper ordinarily to award punitive damages against one who himself is personally innocent and therefore liable only vicariously. See Restatement (Second) of Torts 909, Comment (b).

irreparably tainted by the improper application of a conspiracy theory against Kamisugi.

The miscarriage of justice arising from this "phantom" conspiracy claim is evidenced by the trial judge's stated reliance (twice) on a conspiracy theory where no such claim was ever pled by the Plaintiffs (Tr. 8/29/90:65-66; Appendix D to Kamisugi's Opening Brief) (Tr. 9/7/90:57; Appendix E to Kamisugi's Opening Brief). During the hearings on the post trial motions, the trial judge stated:

> The Court finds that all though (sic) the question is not an easy one, there was substantial evidence from which the jury could find that the defendants Clyde Allison, Libbie Kamisugi, Darlene and David Osterman conspired together to defraud the plaintiffs. . . (Emphasis added).

See Kamisugi's Appendix D. The trial judge reaffirmed his reliance on a conspiracy theory when ruling on Kamisugi's motion for remittitur:

> Turning to defendant Libbie Kamisugi, this Court finds that there was substantial evidence from which the jury could find that the defendants Clyde Allison, Libbie Kamisugi, Darlene and David Osterman conspired together to defraud plaintiffs . . . (Emphasis added).

See Kamisugi's Appendix E.

It is abundantly clear that the trial judge relied on a conspiracy theory to justify the judgment against Kamisugi individually. Furthermore, it is also clear from the Memorandum Opinion that this Court has relied on circumstantial evidence to justify the judgment against Kamisugi. While Kamisugi agrees with this Court that a conspiracy will most likely be based on circumstantial

evidence, there are recognized safeguards to prevent unwarranted claims of conspiracy against innocent parties: (a) the conspiracy must be for an "unlawful purpose"; and (b) the conspiracy must be proven by "clear and convincing" evidence. Doleman v. Meiji Mutual Life Ins. Co., 727 F.2d 1480 (9th Cir. 1984).

Given the recognized errors relating to the Special Verdict and the conspiracy instruction, it is highly probable that the judgment against Kamisugi arose from either (or both) of the following: (a) a conspiracy without an unlawful purpose[9]; and/or (b) a finding of conspiracy based on a mere preponderance of the evidence.
It is impossible to unweave the prejudice caused by the numerous errors at trial. The confusion and misapplication of law permeated the entire trial proceeding, including the trial judge's analysis of the evidence and the law. Even the most thorough review of the "instructions as a whole" cannot cure the blatant prejudice caused by the improper assertion of a conspiracy claim against Kamisugi.

C. KAMISUGI'S RELATIONSHIP WITH THE RESPECTIVE PARTIES, AND HER LACK OF INVOLVEMENT IN THE SUBJECT TRANSACTION. WERE MISUNDERSTOOD.

This Court misapprehended the scope of Kamisugi's relationship with the respective parties and the nature of her involvement with the subject transaction. See Kamisugi's Points on Appeal "B" - "H". In particular, this Court failed to note the following undisputed facts: (a) Libbie & Company had a real estate brokers license separate from the license of Kamisugi (R:Vl:l; R:Vl:27); (b) Kamisugi did

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[9]There is no direct or circumstantial evidence of any wrongdoing by Kamisugi. There is, however, circumstantial evidence that Kamisugi had discussed the subject of the Kuhnert transaction with Allison prior to the signing of DROA. Without the requirement that the conspiracy be for an unlawful purpose, Kamisugi's conversations with Allison could have been viewed by the jury as the basis for a conspiracy.

not inspect the Ostermans' penthouse condominium with Clyde Allison (Tr. 5/16/90:136-141); (c) Kamisugi did not provide specific input to the valuation of the Ostermans' penthouse condominium (Tr. 5/16/90:136-140); (d) Kamisugi was not present at the June 23, 1983 meeting when the DROA was executed (Tr. 5/16/90:150-162; Tr. 6/6/90:142); (e) Kamisugi did not prepare the subject DROA for signature by the parties (Tr. 5/16/90:150-162; Tr. 6/6/90:142); and (f) Kamisugi did not review the DROA until the fully executed DROA was presented to her at the Waikiki Yacht Club (Tr. 5/22/90:32-65).

The Memorandum Opinion fails to identify any evidence, whether direct or circumstantial, which could possibly support the outrageous verdict against Kamisugi.[10] Instead, the Memorandum Opinion merely concludes that "there was abundant circumstantial evidence to support a verdict of fraud. " (Emphasis added) . Memorandum Opinion, p. 4 . This reference to "circumstantial" evidence parallels the trial court's determination that Kamisugi's liability could be justified because of the existence of a "conspiracy. " It is unprecedented that punitive damages be imposed on an individual based merely upon circumstantial evidence, absent "clear and convincing" evidence of wilful and wanton misconduct by that individual.

This absence of direct evidence of Kamisugi ' s involvement in the alleged fraud, together with the obvious errors previously recognized by this Court, add up to a gross miscarriage of justice as to Kamisugi.

D. THE IMPOSITION OF PUNITIVE DAMAGES AGAINST KAMISUGI, UNDER THE CIRCUMSTANCES OF THIS CASE, DEPRIVES KAMISUGI OF PROPERTY WITHOUT DUE PROCESS

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[10] As a result of this Court 's reluctance to specify the evidence supporting the punitive damage award against Kamisugi, to this day she does not know what, if any, wrong she committed.

OF LAW IN VIOLATION OF BOTH THE UNITED STATES AND HAWAII CONSTITUTIONS.

Both the United States and Hawaii Constitutions specifically prohibit the state from "depriv[ing] any person of life, liberty, or property, without due process of law[.]" U.S. Const. amend. XIV, Sec. 1 ; see also Hawaii Const . art. I, Sec . 5 . Under the circumstances of this case, the award of punitive damages, jointly and severally, against Kamisugi and Libbie & Company clearly deprives Kamisugi of property without due process Company clearly deprives Kamisugi of property without due process of law in violation of the federal and state constitutions.

The United States Supreme Court recently has held that an award of punitive damage violates the Due Process Clause of the Fourteenth Amendment unless procedural protections adequately guide and control the discretion of the jury in fashioning the award. See Pacific Mutual Life Insurance Co. v. Haslip, 499 U.S. , 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991): see also Eichenseer v. Reserve Life Insurance Co., 934 F.2d 1377 (5th Cir. 1991) (award of punitive damages unconstitutional unless reasonable procedural safeguards control discretion of jury). Although the Haslip Court ultimately rejected the due process challenge to an award of punitive damages, the Court explicitly noted that under certain circumstances an award of punitive damages may "cross the line into the area of constitutional impropriety." Id. at 111 S.Ct. at 1046, 113 L.Ed.2d at 23.

More importantly, the Court eschewed a formal due process standard:

> We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case. We can say, however, that

> general concerns of reasonableness and adequate guidance from the court when the case is tried to a jury properly enter into the constitutional calculus.

Id. at _____, 111 S.Ct. at 1043, 113 L.Ed.2d at 20 (emphasis added).

The Court reasoned that unlimited discretion in the fashioning of an award of punitive damages invites "extreme results that jar one's constitutional sensibilities." Id. at 111 S.Ct. at 1043, 113 L.Ed.2d at 20. Accordingly, the Court concluded that an award of punitive damages violates the Due Process Clause unless procedural protections adequately control the discretion of the jury to fashion a punitive damage award.

In this case, the trial court clearly failed adequately to guide the jury in determining punitive damages. Although the jury instructions may have provided adequate guidance for the jury's determination of punitive damages, these instructions were thwarted by the Special Verdict form, which set out a clearly erroneous framework for the imposition of punitive damages. More specifically, the Special Verdict form allowed the jury to award punitive damages against Kamisugi without a specific determination that Kamisugi, individually, had acted in a manner warranting the imposition of punitive damages. The Special Verdict form absolutely permitted the jury to assess punitive damages against Kamisugi based on the conduct of Libbie & Company. Moreover, in the event the jury found that Libbie & Company's conduct warranted punitive damages, the Special Verdict form required the jury to also impose punitive damages upon Kamisugi. Such an extreme and arbitrary imposition of punitive damages violates all notions of fundamental fairness and certainly, under Haslip, is unreasonable.

Furthermore, the imposition of liability for punitive damages, jointly, on Kamisugi and Libbie & Company as required by the Special Verdict form is inherently unfair,

implicating Fourteenth Amendment due process concerns. In Haslip, the Court specifically found that the Alabama court's instructions regarding the purpose and imposition of punitive damages "accommodated [defendant's] interest in rational decisionmaking and Alabama's interest in meaningful individualized assessment of appropriate deterrence and retribution." Haslip, 499 U.S. at 111 S.Ct. at 1044, 113 L.Ed.2d at 21 (emphasis added).

In this case, the joint punitive liability imposed by the Special Verdict form prevented the jury from any "meaningful individualized assessment" of the punitive damages to be awarded. Imposing punitive damages jointly creates an extreme result by assessing liability for punitive damages on Kamisugi for the acts of Libbie & Company.

In addition to the lack of judicial guidance on punitive damages, the jury was erroneously allowed to cumulate the financial conditions of both Kamisugi and Libbie & Company in determining the amount of punitive damages attributable to Kamisugi. The United States Supreme Court has specifically recognized that "there is no justice in allowing the recovery of punitive damages, in an action against several defendants, based upon evidence of the wealth and ability to pay such damages on the part of one of the defendants[.]" Washington Gaslight Co. v. Landsen, 172 U.S. 534, 19 S.Ct. 296, 43 L.Ed. 543 (1899); see also Adams v. Murakami, 813 P.2d 1348 (Cal. 1991) (constitution weighs strongly in favor of requiring defendant's financial condition so as to assist in determining whether punitive damages are excessive). Without proper guidance from the court, the jury clearly enjoyed the unchecked type of discretion in assessing the amount of punitive damages which the Haslip Court expressly found to "cross the line into the area of constitutional impropriety." Haslip, 499 U.S. at _____, 111 S.Ct. at 1046, 113 L.Ed.2d at 23.

Even if this Court sincerely believes that the Special Verdict adequately guided the jury in assessing punitive

damages, the trial court obviously did not agree. The trial judge candidly acknowledged problems with the Special Verdict and attempted, sua sponte to correct the jury's Special Verdict form by converting the jury's finding of joint punitive liability against Kamisugi and Libbie & Company to a judgment of joint and several punitive liability against the two defendants.[11] This attempt, however, failed to remedy the obvious error, and in fact compounded the problem.[12] The imposition of joint and several liability for punitive damages is unprecedented and constitutionally unreasonable.

As discussed above, to satisfy constitutional due process requirements, punitive damages must be reasonable and must be assessed with adequate constraints on the discretion of the factfinder imposing the award. Haslip, 499 U.S. at , 111 S.Ct. at 1043, 113 L.Ed.2d at 20. In this case, the court's sua sponte imposition of joint and several liability for punitive damages clearly offends constitutional due process required by Haslip. The law in Hawaii absolutely does not permit Kamisugi to be held liable for the punitive damages imposed upon Libbie & Company, a separate and distinct entity. See Lauer v. Young Men's Christian Association of Honolulu, 57 Haw. 390, 557 P.2d 1334 (1976) (punitive damages must be placed squarely on

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[11]In acknowledging the inherent problems in the Special Verdict, the trial judge also, sua sponte, converted the jury's finding of joint punitive liability on the part of Allison and Libbie & Company to a judgment of punitive liability against Allison only.

[12]The Special Verdict, which was filed on June 19, 1990, provided that "Libbie Kamisugi and Libbie & Company, Inc." should be assessed with punitive damages. (R:V6:1). The Judgment was entered on August 7, 1990, and provided for punitive damages "[a]gainst Defendant Marion Libbie Kamisugi and/or Defendant Libbie & Company, Inc." (R:V6:221). The First Amended Judgment entered on October 18, 1990, similarly provided for punitive damages against "Defendant Marion Libbie Kamisugi and/or Defendant Libbie & Company, Inc., (R:V7:109).

Thus, Kamisugi's joint liability for punitive damages was changed to joint and several liability.

the shoulders of the wrongdoer). The trial court's action in imposing joint and several liability therefore is completely unreasonable and demonstrates, in this case, the court's unbridled discretion in fashioning punitive damage awards. Such unchecked discretion in imposing punitive damages clearly is contrary to the due process requirements as stated in by the Court in Haslip. Under the circumstances of this case, the court's sua sponte imposition of joint and several liability for punitive damages is fundamentally unfair and clearly violates Kamisugi's constitutional due process rights.

IV. CONCLUSION

Based on the foregoing, and the points and authorities previously set forth in her appellate briefs, Kamisugi respectfully requests that this Honorable Court reconsider its Memorandum Opinion affirming the judgment against her and grant her request for a new trial.

DATED: Honolulu, Hawaii, March 23, 1992

/s/ John Y. Yamano
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MARION LIBBIE KAMISUGI

NO. 14956

IN THE SUPREME COURT OF THE STATE OF HAWAII

HEINZ KUHNERT and SHERILYN MARIE KUHNERT,	CIVIL NO. 88-3197
Plaintiffs-Appellees, Cross-Appellants,	APPEAL FROM THE:
vs.	1) JUDGMENT FILED AUGUST 7, 1990;
CLYDE H. ALLISON, LIBBIE & COMPANY, INC., a Hawaii Corporation, MARION LIBBIE KAMISUGI, DARLENE M. OSTERMAN, HERBERT DAVID OSTERMAN,	2) ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION FOR PRE-JUDGMENT INTEREST FILED ON SEPTEMBER 6, 1990;
Defendants-Appellants, Cross-Appellees,	3) FIRST AMENDED NOTICE OF TAXATION OF COSTS; BILL OF COSTS; AFFIDAVIT OF GERALD H. KURASHIMA; EXHIBIT "A"; CERTIFICATE OF SERVICE, FILED SEPTEMBER 20, 1990
and	and
	4) ORDER DENYING DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT
	[MEMORANDUM OPINION]

and	) ON THE ISSUE OF
	) FRAUD FILED ON
JOHN DOE 1-5, DOE	) APRIL 9, 1990, FILED
CORPORATION 1-5,	) MAY 21, 1990
DOE PARTNERSHIP 1-5,	)
AND DOE	) APPEAL AND CROSS-
GOVERNMENTAL	) APPEAL FROM THE:
ENTITY 1-5,	)
	) 1) FIRST AMENDED
Defendants.	) JUDGMENT FILED
	) OCTOBER 18, 1990; and
	)
	) 2) ORDER DENYING IN
	) PART AND GRANTING
	) IN PART DEFENDANT
	) CLYDE H. ALLISON,
	) LIBBIE & COMPANY,
	) INC., DARLENE M.
	) OSTERMAN AND
	) HERBERT DAVID
	) OSTERMAN'S MOTION
	) FOR JUDGMENT
	) NOTWITHSTANDING
	) THE VERDICT OR, IN
	) THE ALTERNATIVE
	) FOR NEW TRIAL OR
	) REMITTITUR FILED
	) JULY 27, 1990;
	) DEFENDANTS CLYDE
	) H. ALLISON, LIBBIE &
	) COMPANY, INC.,
	) DARLENE OSTERMAN
	) AND HERBERT DAVID
	) OSTERMAN'S
	) SUPPLEMENTAL
	) MEMORANDUM IN
	) SUPPORT OF THEIR
	) MOTION FILED 7/27/90,

) FILED ON AUGUST 20,
) 1990; SUPPLEMENTAL
) AFFIDAVIT OF JOHN
) HOUK IN SUPPORT OF
) DEFENDANTS'
) MOTION FILED 7/27/90,
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) SEPTEMBER 6, 1990
) AND DEFENDANT
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) KAMISUGI'S MOTION
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) JULY 27, 1990;
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) LIBBIE KAMISUGI'S
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) FILED ON AUGUST 20,
) 1990, FILED ON
) SEPTEMBER 6, 1990,
) FILED OCTOBER 18,
) 1990
)
) FIRST CIRCUIT COURT

MEMORANDUM OPINION

This is an appeal by Clyde H. Allison (Allison), Libbie & Company, Inc., Marion Libbie Kamisugi (Kamisugi), and Darlene M. Osterman and Herbert David Osterman (Ostermans) from a judgment for damages and punitive damages, in what is essentially a fraud action, brought against them by Heinz W. Kuhnert and Sherilyn Marie Kuhnert (Kuhnerts). The Kuhnerts cross-appeal from the order of remittitur of a portion of the punitive damages found by the jury. We affirm.

In 1983, the Kuhnerts engaged Libbie & Company, a real estate firm, whose principal and broker was Kamisugi, and one of whose salesman was Allison, to handle the sale of their Nuuanu home. They wanted a cash transaction. eventually they entered into a DROA and a sale with the Ostermans, where they received part cash, and the Ostermans' condominium apartment, pursuant to representations that it had a value vastly in excess of the value which it in fact had. When the inflation was discovered, this suit was brought.

The claim was made that Mrs. Osterman was herself engaged in the real estate business, that the Ostermans *knew*

that the value was inflated, that Allison knew that the value was inflated, that Kamusugi knew that the value was inflated, that Libbie & Company therefore knew that the value was inflated, and that the transaction constituted intentional fraud for which compensatory and punitive damages were payable. The Ostermans filed counterclaims for fraud against the Kuhnerts and the case was eventually tried to a jury which returned a verdict for the Kuhnerts, against all the appellants, assessing both compensatory and punitive damages. The judge below, on a motion for new trial, remitted some of both the compensatory and punitive damages, and granted a new trial unless the Kuhnert accepted the remittitur. They did, but the appellants brought this appeal anyway. The Kuhnerts then cross-appealed, urging that the remittitur of punitive damages was improper.

Appellant Kamisugi, in her points of error, urges that the trial court erred in submitting the special verdict form to the jury because it was legally incorrect and confusing, and led to double recovery. Appellant did not raise the objections, now raised to the verdict form, at trial, and so must rely upon a claim of plain error. Given the discussion held at the time that the jury form was proposed, and the somewhat complicated problems with respect to punitive damages, arising out of the facts of this case, we see no plain error.

Appellant's second, third, fourth, fifth, sixth, seventh and eighth points go to claims that, in effect, various aspects of her responsibility for the fraud were not established by the applicable standards with respect to the burden of proof. Our review of the evidence indicates to us that the jury was justified in finding clear and convincing evidence of her participation in the fraud, and thus that it was proper to deny her motions for directed verdict, for judgment notwithstanding the verdict, insofar as the directed verdict motion may have preserved that point, and her motion for new trial.

Fraud, by its nature, is seldom proved by confession of the persons participating in it. It is usually proved by circumstantial evidence. In our view, there was abundant circumstantial evidence to support a verdict of fraud, whether the standard be clear and convincing evidence, as appellant urged in some of her points, or merely substantial evidence as she urges in others.

Appellant complains that the court below erred in granting the motion for prejudgment interest. Prejudgment interest is a matter normally left within the discretion of the trial court. We find no abuse of discretion, or violation of statute in this case.

Appellant also urges error in the giving of what she denominates a conspiracy instruction, but that instruction was not objected to.

In a normal trial, instructions are considered and argued individually before the trial judge. But, on review, the instructions, as given, must be viewed as a whole. Therefore, while it is likely that the trial judge, had the instruction been objected to, would have refused it at the time instructions were settled, nevertheless, viewing the instructions as a whole, we find no plain error.

Appellant claims plain error in the giving of an instruction on fiduciary duty, which she says, when read together with the special verdict form, would lead the jury to believe that a breach of fiduciary duty by one defendant would make all the defendants liable therefor. Again, neither the instruction nor the special verdict form were objected to on these grounds, and we see no plain error.

Finally, appellant urges that denying a remittitur of the commission of $78,000 paid on the fraudulent transaction and the remaining punitive damages award against her were error. We do not agree.

Appellants Allison and Libbie & Company urge plain error in the giving of the two instructions discussed

above and in the giving of the special verdict form. We reject these contentions for the same reasons we rejected them with respect to appellant Kamisugi.

These appellants also urge there is insufficient evidence of fraud, and that therefore their motion for a new trial should be granted. There was clear evidence of fraud. They also object to the denial of a full remittitur of damages against them and in the granting of prejudgment interest. we find no error.

Appellant Ostermans urge error in finding them liable for fraud and for general damages. On the record, there was ample evidence to support both findings by the jury.

These appellants also urge error in allowing Mr. Kuhnert to testify as to the evidence of Mrs. Kuhnert's emotional distress. We find no error. They urge, in addition, that the jury erred in finding them liable for punitive damages, in denying their motions for directed verdict, for judgment notwithstanding the verdict, for denying their motion for a new trial, in granting the motion for remittitur of punitive damages only in part, and in giving the so-called conspiracy instruction. We find no error. There was ample evidence of the participation of both of the Ostermans in the fraud, ample evidence to support a finding of punitive damages, and ample reason to deny their various motions.

Appellants urge error in admitting evidence on the listing price of the property in 1989 and other evidence with respect to the same matter. We think such evidence was relevant in the circumstances of this case.

Appellants also urge error in the awarding of prejudgment interest. What we have said previously applies to their appeal also.

Appellants also urge error in denying a cross-examination of appellee Mr. Kuhnert as to his experience in

real estate. We find no abuse of discretion in that limitation of cross-examination.

Finally, as to the cross-appeal on the remittitur, remittitur is normally a matter within the discretion of the trial court and, in the circumstances of this case, we see no abuse of discretion. Judgment affirmed.

DATED: Honolulu, Hawaii, March 13, 1992.

/s/ Herman Lum
/s/ Frank D. Padgett
/s/ Yoshimi Hayashi
/s/ James Wakatsuki
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NO. 14956

IN THE SUPREME COURT OF THE STATE OF HAWAII

HEINZ KUHNERT and SHERILYN MARIE KUHNERT,	)	CIVIL NO. 88-3197
Plaintiffs-Appellee,	)	APPEAL FROM THE (1) JUDGMENT ENTERED ON AUGUST 7, 1990; (2) "FIRST AMENDED JUDGMENT" ENTERED ON OCTOBER 18, 1990; (3) "ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION FOR PRE-JUDGMENT INTEREST FILED ON SEPTEMBER 6, 1990," ENTERED ON OCTOBER 8, 1990; (4) "ORDER DENYING IN PART AND GRANTING IN PART DEFENDANT CLYDE H. ALLISON, LIBBIE & COMPANY, INC., DARLENE M. OSTERMAN AND HERBERT DAVID OSTERMAN'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR, IN THE ALTERNATIVE FOR NEW TRIAL OR REMITTITUR FILED JULY 27, 1990;
vs.	)	
CLYDE H. ALLISON, LIBBIE & COMPANY, INC., a Hawaii Corporation, MARION LIBBIE KAMISUGI, DARLENE M. OSTERMAN, HERBERT DAVID OSTERMAN, John Doe 1-5, Doe Corporation 1-5, Doe Partnership 1-5, And Doe Governmental Entity 1-5,	)	
Defendants-Appellant.	)	

) DEFENDANTS CLYDE
) H. ALLISON, LIBBIE &
) COMPANY, INC.,
) DARLENE OSTERMAN
) AND HERBERT DAVID
) OSTERMAN'S
) SUPPLEMENTAL
) MEMORANDUM IN
) SUPPORT OF THEIR
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) 27, 1990, FILED ON
) AUGUST 20, 1990;
) SUPPLEMENTAL
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) HOUK IN SUPPORT OF
) DEFENDANTS'
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) 17, 1990, FILED ON
) SEPTEMBER 6, 1990,
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) (5) "FIRST AMENDED
) NOTICE OF TAXATION
) OF COSTS; BILL OF
) COSTS" FILED ON
) SEPTEMBER 20, 1990

) FIRST CIRCUIT COURT
)
) HONORABLE ROBERT
) G. KLEIN
) HONORABLE PHILIP T.
) CHUN
) HONORABLE TENNEY
) TONGG
) HONORABLE LELAND
) H. SPENCER

DEFENDANT-APPELLANT/CROSS-APPELLEE
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NO. 14956

IN THE SUPREME COURT OF THE STATE OF HAWAII

HEINZ KUHNERT and SHERILYN MARIE KUHNERT, Plaintiffs-Appellee, vs. CLYDE H. ALLISON, LIBBIE & COMPANY, INC., a Hawaii Corporation, MARION LIBBIE KAMISUGI, DARLENE M. OSTERMAN, HERBERT DAVID OSTERMAN, John Doe 1-5, Doe Corporation 1-5, Doe Partnership 1-5, And Doe Governmental Entity 1-5, Defendants -Appellant.	CIVIL NO. 88-3197 DEFENDANT-APPELLANT/CROSS-APPELLEE MARION LIBBIE KAMISUGI'S REPLY BRIEF

DEFENDANT-APPELLANT/CROSS-APPELLEE MARION LIBBIE KAMISUGI'S REPLY BRIEF

I. SUMMARY OF ARGUMENT

The ultimate question presented by this appeal is whether Defendant-Appellant Marion Libbie Kamisugi ("Kamisugi") is entitled to judicial relief from the

outrageous jury verdict (and resulting judgment) assessed against her where: (1) the jury's verdict is irreparably tainted by the plain error arising from the special verdict form submitted to the jury; (2) there was plain error arising from the trial court's erroneous submission of prejudicial jury instructions, including an instruction which clearly misstated the elements of a civil conspiracy; (3) there is no substantial evidence of a clear and convincing nature to support the findings of fraud and punitive damages against Kamisugi; and (4) the trial court acknowledged that the jury's verdict was the result of passion and prejudice.

Kamisugi respectfully submits that the numerous errors in the trial court proceedings resulted in a gross miscarriage of justice that requires a reversal of the judgment against Kamisugi. At a minimum, Kamisugi respectfully requests that she be afforded a new trial.

In response to Kamisugi's appeal, Plaintiffs-Appellees Heinz and Sherilyn Marie Kuhnert ("Kuhnerts") have asked this Honorable Court to affirm the injustice perpetrated upon Kamisugi based on a strict construction of the Hawaii Rules of Civil Procedure and Hawaii Rules of Appellate Procedure.[1] The Kuhnerts' reliance on claims of "waiver" completely ignores the well-established doctrine of "plain error" which was developed to address the exact circumstances presented herein. Indeed, the Kuhnerts' plea for a restoration of the "full amounts awarded by the jury" rings hollow given the numerous errors which led to the jury's original verdict. Quite simply, Kamisugi has yet to obtain a 'fair trial" on the merits of the claims filed against her.

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[1]The Kuhnerts' campaign for a strict construction of the applicable rules- of procedure is inconsistent with their blatant disregard of H.R.A.P. Rule 32(b), which requires that all papers and briefs filed with the appellate court must be 'standard 12 point pica or equivalent.' The Kuhnerts' answering brief utilizes proportional spacing, which appears to allow approximately 15-20% more characters per line. Accordingly, the Kuhnerts' answering brief is in violation of the Hawaii Rules of Appellate Procedure.

II. ARGUMENT

A. THIS COURT CAN, AND SHOULD, REMEDY THE PLAIN ERROR ARISING FROM THE DEFECTIVE VERDICT FORM.

The Kuhnerts' contention that the jury made independent findings of liability against Kamisugi is pure speculation. Indeed, the form of Special Verdict submitted to the jury forced the jury consider the claims against Kamisugi jointly with the claims against Libbie & Company, Inc., on every question submitted to the jury. (R:V6:1; Appendix A to Kamisugi's Opening Brief). Because of the defective form of Special Verdict, it is impossible to determine whether: (1) the jury intended to impose liability against Kamisugi personally; or (2) the jury imposed liability on Kamisugi based on an improper application of vicarious liability. Indeed, this Honorable Court can only guess as to whether the jury would have assessed liability against Kamisugi personally if she had been properly identified on the special Verdict individually, rather than jointly with Libbie & Company, Inc. Accordingly, the jury verdict and resulting judgment against Kamisugi are patently erroneous and should be reversed.

The Kuhnerts incorrectly argue that the defective form of Special Verdict cannot provide a basis for a new trial because a proper objection was not asserted at trial. It is clearly recognized that a party's failure to make a timely objection at trial will not prohibit an appellate court from taking cognizance of the trial court's error "if the error is plain and may result in a miscarriage of justice," Turner v. Willis, 59 Haw. 319, 324, 582 P.2d 710, 714 (1978). An appellate court can vacate a judgment and grant a new trial if an error "seriously affected the fairness, integrity or public reputation of judicial proceedings" notwithstanding the party's failure to properly object at trial. Morris v. Getscher, 708 F.2d 1306, 1309 (8th Cir. 1983).

Here, the extreme prejudice arising from the defective form of Special Verdict constitutes "plain error," and mandates appropriate relief from this Honorable Court. See Schaafsma v. Morin Vermont Corp., 802 F.2d 629, 636 (2d Cir. 1986) (the "plain error" doctrine used to address prejudicial errors in jury interrogatories submitted pursuant to Federal Rule of Civil Procedure 49(b) even in the absence of a timely objection).[2]

B. THIS COURT CAN, AND SHOULD, REMEDY THE PLAIN ERROR ARISING FROM THE ERRONEOUS JURY INSTRUCTION SUBMITTED BY THE TRIAL COURT.

The trial court clearly erred in submitting Jury Instruction No. 22 (Plaintiffs Proposed Jury Instruction No. 155) to the jury.[3] The instruction stated:

> If several persons combined and conspired to effect a common object and it is arranged -- that each shall do certain acts and perform certain parts with a view to the attainment of the same common result and an overt act is committed in furtherance of the common object, then all persons will be responsible

---

[2]The Kuhnerts' argument that the defective form of Special Verdict constitutes "invited error" is misplaced. Unlike the situation in Struzik v. City and County, 50 Haw. 241, 245 (1968), Kamisugi did not affirmatively request that the defective form of Special Verdict be submitted to the jury. Rather, Kamisugi failed to object to the form prepared by the trial court. The distinction between this case and Struzik is significant. There is a much stronger policy argument against reviewing an error affirmatively created by a party versus an error that was allowed to escape without a proper objection by counsel.

[3]The Kuhnerts' contend that Kamisugi's Statement of Points of Error regarding this defective jury instruction violated Haw. Rules of App. Proc. Rule 28(b)(4)(B) because it failed to quote "the objections urged at trial." This argument ignores the obvious: a point of error based upon the "plain error" doctrine cannot include a quotation of "the objections urged at trial" because there were none.

> for the acts of each of them. (Emphasis added)

(Tr. 6/15/90:37). The instruction constitutes plain error because: (1) Kuhnerts failed to plead conspiracy and/or to present any credible evidence that the Defendants entered into a conspiracy; (2) Kuhnerts failed to establish that Defendants committed an overt act or act in furtherance of the agreed upon objective of the alleged conspiracy; (3) the instruction incorrectly defined the elements of conspiracy by failing to mention any element of unlawfulness; and (4) the instruction failed to include a statement regarding the applicable standard of proof for a conspiracy claim -- clear and convincing evidence. Doleman v. Meiji Mutual Life Ins. Co., 727 F.2d 1480 (9th Cir. 1984).

The Kuhnerts contention that Instruction No. 22 was "not a 'conspiracy instruction'" borders on the frivolous. Regardless of the intent of the parties and/or the trial court in submitting the instruction, the clear language raises the issue of a conspiracy claim. Indeed, any reasonable person would read Instruction No. 22 as involving a claim for conspiracy. The prejudice resulting from the improper jury instruction is clear - - given Kamisugi's lack of involvement in the subject transaction, her liability could only arise from guilt by association." The confusion regarding the existence of a "conspiracy" claim against Kamisugi is highlighted by the trial court's evaluation of the claims against Kamisugi during hearings on post trial motions:

> The Court finds that all though [sic] the question is not an easy one, there was substantial evidence from which the jury could find that the defendants Clyde Allison, Libbie Kamisugi, Darlene and David Osterman **conspired** together to defraud the plaintiffs. . . (Emphasis added)

(Tr. 8/29/90:65-66; Appendix D to Kamisugi's Opening Brief). The trial court reiterated its finding of conspiracy at the hearing on Defendants' motions for remittitur:

> Turning to defendant Libbie Kamisugi, this Court finds that there was substantial evidence from which the jury could find that the defendants Clyde Allison, Libbie Kamisugi, Darlene and David Osterman **conspired** together to defraud plaintiffs . . . (Emphasis added)

(Tr. 9/7/90:57; Appendix E to Kamisugi's Opening Brief).

It is pure speculation as to whether the jury would have made an independent finding of fraud against Kamisugi absent the erroneous instruction on conspiracy. Indeed, even the trial court mistakenly relied upon a theory of conspiracy in affirming the jury's findings of liability against Kamisugi. Clearly, it was reversible error for the trial judge to improperly instruct the jury on the rule of law pertaining to conspiracy. City and County of Honolulu v. Bonded Inv. Co., Ltd., 54 Haw. 385, 507 P.2d 1084 (1973).

Even though a timely objection to the instruction was not made at the time of trial, the "plain error" doctrine allows this court to remedy the manifest injustice caused by the erroneous instruction: "[F]ailure to adequately object is not an absolute bar to this Court's consideration of an [jury] instruction which, in our opinion, constitutes reversible error." Turner, 59 Haw. at 324, 582 P.2d at 714. "Erroneous instructions are presumptively harmful and are a ground for reversal unless it affirmatively appears from the record as a whole that the error was not prejudicial." Turner, 59 Haw. at 326, 582 P.2d at 715. Reversible error in jury instructions could also occur if "the entire charge, viewed in light of all of the evidence, would tend to confuse or mislead the jury as to the principles of law that apply to the facts. A charge that appears likely to have left the jury

'highly confused' may, on that ground alone, be reversed." National Railroad Passenger Corp. v. 25,900 Sq. Ft. Parcel of Land, 766 F.2d 685, 688 (2nd Cir. 1985).[4]

C. JUDICIAL RELIEF IS MANDATED GIVEN THE LACK OF SUBSTANTIAL EVIDENCE OF A CLEAR AND CONVINCING NATURE IN SUPPORT OF THE JURY'S FINDINGS OF FRAUD AND PUNITIVE DAMAGES AGAINST KAMISUGI.

There is no dispute among the parties that the standard of proof to establish claims of fraud and/or punitive damages at trial is "clear and convincing evidence." However, the Kuhnerts' answering brief only discusses the purported existence of "substantial evidence" in support of the findings of fraud and punitive damages against Kamisugi. The Kuhnerts fail to acknowledge that on appellate review, such evidence must still meet the applicable standard of proof - - i.e. "clear and convincing evidence' for claims of fraud and punitive damages. MPM Hawaiian, Inc. v. Amigos Inc., 63 Haw. 485, 486-87 (1981); Orkin Exterminating Company, Inc. v. Traina, 461 N.E.2d 693, 698 (Ind. App. 4 Dist. 1984). Indeed, the Kuhnerts have carefully sidestepped one of the primary issues in this appeal: Was there substantial evidence of a **clear and convincing nature** to support the jury's findings of fraud and punitive damages against Kamisugi.

In MPM Hawaiian, the court noted that where there is "substantial evidence" to support findings of the trial court, such findings cannot be set aside. The court then defined "substantial evidence" as follows:

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[4]As with the form of Special Verdict, the erroneous jury instruction on civil conspiracy does not represent "invited error." Struzik, 50 Haw. 241. Although counsel for Kamisugi did not object to the submission of Plaintiffs' Proposed Instruction 155/Instruction 22, Kamisugi did not affirmatively request the submission of the instruction.

Substantial evidence is credible evidence which is of sufficient quantity and **probative value** to justify a reasonable man in reaching a conclusion. (Emphasis added)

MPM Hawaiian, 63 Haw. at 486-487.

In Orkin, the court stated:

> In reviewing a jury's award of punitive damages, we will neither weigh the evidence nor determine the credibility of witnesses. Our inquiry is limited to determining whether the verdict is sustained by substantial evidence of probative value. [citation omitted].
>
> * * * *
>
> To be substantial and of probative value as to a punitive damages award, the evidence must be clear and convincing, that is, there must be some evidence(a) of malice, fraud, gross negligence or oppressive conduct mingle in the breach in tortious breach of contract cases or of malicious, reckless, or wilful and wanton misconduct in pure tort cases, and (b) the tortious conduct is inconsistent with a hypothesis of mere negligence, mistake of law or fact, over-zealousness, or other noniniquitous human failing. (Emphasis added)

Orkin, 461 N.E.2d at 698. See also Munial v. Baird & Narner, Inc., 485 N.E.2d 855, 865 (Ill. App. 2 Dist. 1985) (on appeal, court examined claim of fraud against real estate broker and found that plaintiffs failed to establish by "clear and convincing evidence that broker was guilty of fraud).

In the present case, the record falls far short of supporting the judgment against Kamisugi, and judgment

should accordingly be entered in favor of Kamisugi.[5] At a minimum, Kamisugi should be afforded a new trial. As noted in Peterson v. City & County, 53 Haw. 440, 441 (1972):

> A motion for a new trial, on the ground that the verdict is **against the weight of the evidence,** makes a more limited claim [than a motion for directed verdict]. The movant need not convince the court to rule that no substantial evidence supports his opponent s case, but only that the verdict rendered for his opponent is against the **manifest weight of the evidence.** Thus, if each party has introduced enough evidence to make a jury case, but one party's evidence clearly outweighs the other party's evidence, a motion for new trial could be granted even though a motion for a directed verdict would have to be denied. (Emphasis added)

Peterson, 53 Haw. 441. Accordingly, even if this Honorable Court determines that a directed verdict/judgment notwithstanding the verdict in favor of Kamisugi was not appropriate, it can and should order a new trial.[6]

---

[5]The Kuhnerts' efforts to cloud the issue by raising a plethora of irrelevant facts is undermined by the testimony of their own expert who candidly acknowledged that the subject transaction was a done deal before Kamisugi ever saw the DROA: "Kamisugi's review at the Yacht Club was useless because she could not change the terms after it was executed." (Tr. 5/23/90 111-112).

[6]The Kuhnerts incorrectly cite State v. Faulkner, 1 Haw. App. 651, 654, 624 P.2d 940 (1981) for the proposition that "[i]f there is more than a scintilla to support the verdict returned by the jury, the reviewing court will not upset the denial of new trial." Kuhnerts' Answering Brief, p. 15. The proposition is not contained in the cited opinion. Furthermore, Faulkner involved claims that the trial court erred in denying a motion for new trial on the bases of: (1) newly discovered evidence; and (2) juror misconduct. Faulkner, 1 Haw. App. at 656. These issues are not present in this appeal.

D. THERE IS INSUFFICIENT EVIDENCE TO SUPPORT THE JURY'S FINDING THAT KAMISUGI BREACHED A FIDUCIARY DUTY PURPORTEDLY OWED TO THE KUHNERTS.

As discussed in Kamisugi's opening brief, the existence and effect of an agent's fiduciary duties is **contractual,** and is subject to the terms of the agreement whereby the agent agreed to act on behalf of the principal. For example, while a real estate broker is ordinarily an agent, the agreement between the broker and the owner of land may be such that the broker has no fiduciary duties and hence is not an agent. Restatement (Second) of Agency §13, Comment b. In the present case, it is undisputed that Kamisugi was not a party to the Exclusive Right-To-Sell Listing Agreement between the Kuhnerts and Libbie & Company, Inc.

Kuhnerts' attempt to manufacture a fiduciary relationship between Kamisugi and the Kuhnerts based on: (1) the testimony of witnesses regarding a "belief" that such a relationship existed; and (2) misleading case citations, is unpersuasive. First, just as a valid fiduciary relationship cannot be nullified simply because a party testifies that the relationship never existed, a fiduciary relationship cannot be manufactured solely on a party's belief that such a relationship did exist.

Second, the Kuhnerts' reliance on certain case law is clearly misplaced. For example, in further "support" of their claim that Kamisugi personally owed a fiduciary duty to the Kuhnerts, they state: "In Silva v. Bisbee, 2 Haw. App. 188, 190, 628 P.2d 214 (1981), the Intermediate Court of Appeals found that both the individual real estate salesperson, Bisbee, and the brokerage, Midkiff Realty, Inc. were in a fiduciary relationship to the Plaintiffs." See Kuhnerts' Answering Brief, p. 17. This citation is misleading for several reasons: (1) Bisbee was a real estate **broker,** not a sales agent; (2) Bisbee and Midkiff Realty,

Inc. conceded that they stood in a fiduciary relationship to the Plaintiffs under the subject listing contract; (3) Bisbee personally obtained the subject listing contract and personally maintained responsibility for the transaction; and (4) Bisbee's fiduciary relationship did not arise merely from her relationship with the corporate brokerage company. Silva does not support the Kuhnerts' contention that the every member of the corporate brokerage company stands in a fiduciary relationship with the corporate brokerage company s clients.

In the present case, the Kuhnerts have tried to defend the jury's verdict regarding the issue of breach of fiduciary duty. However, their position is not supported by the record. Indeed, the record lacks any probative evidence that Kamisugi personally owed a fiduciary relationship to the Kuhnerts.

III. CONCLUSION

Kamisugi respectfully requests that the Order Denying Motions for JNOV/New Trial be reversed, and that judgment be entered in favor of Kamisugi. In the alternative, Kamisugi respectfully requests that the Order Denying Motions for JNOV/New Trial be reversed and the matter remanded for a new trial. Lastly, Kamisugi respectfully requests that the Order Granting In Part And Denying In Part Plaintiffs' Motion for Prejudgment Interest be reversed, and that Kuhnerts' request for prejudgment interest be denied.

DATED: Honolulu, Hawaii, July 19, 1991

/s/ John Y. Yamano
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MARION LIBBIE KAMISUGI

NO. 14956

IN THE SUPREME COURT OF THE STATE OF HAWAII

HEINZ KUHNERT and SHERILYN MARIE KUHNERT,	) CIVIL NO. 88-3197
Plaintiffs-Appellees, Cross-Appellants	) APPEAL FROM THE:
vs.	) (1) JUDGMENT FILED AUGUST 7, 1990;
CLYDE H. ALLISON, LIBBIE & COMPANY, INC., a Hawaii Corporation, MARION LIBBIE KAMISUGI, DARLENE M. OSTERMAN, HERBERT DAVID OSTERMAN,	) (2) ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION FOR PRE-JUDGMENT INTEREST FILED ON SEPTEMBER 6, 1990, ENTERED ON OCTOBER 18, 1990;
Defendants -Appellants, Cross -Appellees,	) (3) FIRST AMENDED NOTICE OF TAXATION OF COSTS; BILL OF COSTS FILED SEPTEMBER 20, 1990
and	) (4) ORDER DENYING DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON THE ISSUE OF FRAUD FILED ON APRIL 9, 1990, FILED MAY 21, 1990;

John Doe 1-5, Doe Corporation 1-5, Doe Partnership 1-5, and Doe Governmental Entity 1-5,

Defendants.

) (5) FIRST AMENDED
) JUDGMENT FILED
) OCTOBER 18, 1990;
)
) (6) ORDER DENYING
) IN PART AND
) GRANTING IN PART
) DEFENDANT CLYDE H.
) ALLISON, LIBBIE &
) COMPANY,INC.,
) DARLENE M.
) OSTERMAN AND
) HERBERT DAVID
) OSTERMAN'S MOTION
) FOR JUDGMENT
) NOTWITHSTANDING
) THE VERDICT OR, IN
) THE ALTERNATIVE
) FOR NEW TRIAL OR
) REMITTITUR FILED
) JULY 27, 1990, FILED
) ON SEPTEMBER 6,
) 1990, DEFENDANT
) MARION LIBBIE
) KAMISUGI'S MOTION
) FOR JUDGMENT
) NOTWITHSTANDING
) THE VERDICT
) RENDERED ON JUNE
) 19, 1990, OR IN THE
) ALTERNATIVE FOR A
) NEW TRIAL OR
) REMITTITUR FILED ON
) JULY 27, 1990, AND
) DEFENDANT MARION
) LIBBIE KAMISUGI'S
) AMENDED MOTION
) FILED ON

) AUGUST 20, 1990
) FILED OCTOBER 18,
) 1990
)
) FIRST CIRCUIT COURT
)
) HONORABLE ROBERT
) G. KLEIN HONORABLE
) PHILIP T. CHUN
) HONORABLE TENNEY
) TONGG
) HONORABLE LELAND
) H. SPENCER
) Judges

PLAINTIFFS-APPELLEES' AND CROSS-APPELLANTS' BRIEF ANSWERING THE OPENING BRIEF BY DEFENDANT-APPELLANT CROSS-APPELLEE MARION LIBBIE KAMISUGI
STATEMENT OF RELATED CASES
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NO. 14956

IN THE SUPREME COURT OF THE STATE OF HAWAII

HEINZ KUHNERT and SHERILYN MARIE KUHNERT,	) CIVIL NO 88-3197
Plaintiffs-Appellees, Cross-Appellants	) PLAINTIFFS-APPELLEES' AND CROSS-APPELLANTS' BRIEF ANSWERING THE OPENING BRIEF FILED BY DEFENDANT-APPELLANT CROSS-APPELLEE MARION LIBBIE KAMISUGI
vs.	
CLYDE H. ALLISON, LIBBIE & COMPANY, INC. a Hawaii Corporation, MARION LIBBIE KAMISUGI, DARLENE M. OSTERMAN, HERBERT DAVID OSTERMAN,	
Defendants-Appellants, Cross-Appellees,	
and	

JOHN DOE 1-5, DOE)
CORPORATION 1-5,)
DOE PARTNERSHIP 1-5,)
AND DOE)
GOVERNMENTAL)
ENTITY 1-5,)
)
Defendants.)
)

PLAINTIFFS-APPELLEES' AND CROSS-APPELLANTS' BRIEF ANSWERING THE OPENING BRIEF FILED BY DEFENDANT-APPELLANT CROSS-APPELLEE MARION LIBBIE KAMISUGI

I. STATEMENT OF JURISDICTION

Plaintiffs-Appellees' and Cross-Appellants Heinz and Sherilyn Kuhnert do not take exception to the Statement of Jurisdiction filed in the Opening Brief. The Opening Brief was timely filed. Pursuant to an order granting an extension to file the Answering Brief on or before July 10, 1991, this Brief is timely filed.

II. STATEMENT OF PROCEEDINGS BELOW

This case arose from a Complaint filed by the Plaintiffs Kuhnert against the Defendants Allison, Kamisugi, Libbie & Co. and the Ostermans on October 13, 1988. (RA I, 1-24).

Trial began on May 10, 1990 and concluded on June 15, 1990. The jury deliberated for three days and returned the verdict on June 19, 1990. (Special Verdict RA VI, 4-5, App. A). The jury found that all the Defendants had made fraudulent misrepresentations or fraudulently concealed information; and that Clyde H. Allison, Marion Libbie Kamisugi and Libbie & Company, Inc. had breached their

fiduciary duty to the Kuhnerts. The jury simultaneously found that the Kuhnerts did not fraudulently misrepresent information about the Old Pali Road home they sold to Darlene Osterman and Herbert David Osterman.

On August 7, 1990, Judgment was entered in favor of the Plaintiffs and against the Defendants. Plaintiffs were awarded $498,625.00 in special damages and $20,000.00 in general damages to Heinz Kuhnert, $10,000.00 in general damages to Sherilyn Kuhnert, against all defendants, and punitive damages of $500,000.00 against Allison, $1,465,000.00 against Kamisugi and Libbie & Company, Inc., $250,000.00 against Darlene Osterman and $250,000.00 against David Osterman. (Special Verdict, App. A, Judgment, RA VI, 221-230, App. B).

Defendants filed their motions for judgment notwithstanding the verdict, new trial, or in the alternative, remittitur on July 27, 1990. (RA VI, 109-162, 167-218). The court denied the Defendants' motions with the exception of David Osterman, who was granted a new trial as to punitive damages only because of the alleged inadequate evidence on his earnings. [1]

The trial court specifically found there was substantial evidence to sustain the jury's finding of fraud and misrepresentation. However, the trial court required Plaintiffs to accept a reduction of the punitive damages against Allison from $500,000.00 to $200,000.00, Kamisugi and Libbie & Co. from $1,465,000.00 to $293,000.00 and Darlene Osterman from $250,000.00 to $125,000.00 or elect a new trial on all issues. (TR 9/7, pp. 56-60). On October 18, 1990, the First Amended

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[1]The courts are divided as to whether evidence of the financial worth of one or more joint defendants may be or must be presented at trial, with some jurisdictions holding that no evidence may be presented when punitive damages are sought. ***Anno. Financial Worth of One or More of Several Joint Defendants as Proper Matter for Consideration in Fixing Punitive Damages,*** 9 ALR 3d. 692.

Judgment was filed. (RA VII, 109-112, App. C). By Notice dated November 13, 1990, (RA VII, 132) the Plaintiffs elected to accept the remittitur of punitive damages. The Defendants timely appealed and the Plaintiffs timely cross-appealed (RA VII, 263-278).

III. STATEMENT OF THE CASE.

A. Plaintiffs Controvert Kamisugi's Statement Of The Case Because Of Omissions Material To Consideration Of The Issues of Kamisugi's Breach of Fiduciary Duty and Fraud.

The jury was asked to determine whether the Kuhnerts were defrauded in a real estate transaction involving the sale of their property located on Old Pali Road (Pali), by their real estate agents Allison, Kamisugi and Libbie & Co., and the Ostermans, the buyers, one of whom was also a real estate agent.

Through a DROA executed on June 23, 1983 (Ex. P-11, App. D), the Ostermans were able to purchase the Kuhnerts' Pali home priced at $1.3 million, although all Defendants knew the Ostermans could not afford it. In order to make the transaction work, they valued the Osterman's Punahou Regency penthouse at $950,000.00, although it had been appraised earlier at only $485,000.00 in a non-appreciating market (TR 5/16, p. 126, TR 6/4, p. 78, TR 5/16, p. 144, Ex. P-8).

The jury unanimously found by clear and convincing evidence that all Defendants had defrauded the Kuhnerts. (Special Verdict, RA VI, 4-5, App. A). Applying the clear and convincing standard enunciated in ***Masaki v. General Motors Corporation***, 71 Haw. 1, 780 P. 2d 566 (1989), the jury awarded punitive damages against the Defendants in varying amounts in recognition of the differences in culpability.

The jury learned that Kamisugi dealt with "high-range" or million dollar properties (TR 6/4, p. 19) and that

Kamisugi's assets included interests in a condominium on Molokai worth $185,000.00 (TR 5/25, pp. 79-80) and one on Maui worth between $285,000.00 and $500,000.00 (TR 5/25, p. 83, Ex. P-86-A, TR 6/1, p. 67), a $500,000.00 account receivable for a house on Hale Koa Drive (TR 6/1, p. 56), $1,663,000.00 in accounts receivables for lots which sold for $2,590,000.00 on 2.005 acres at the Waialae Pinnacle (TR 5/25, p. 104), a three story home on 3.932 acres of fee simple land, at 2500 Aha Aina Street, Waialae Nui Ridge, which had 17,000 square feet under roof, two swimming pools, an elevator, views of the ocean and Diamond Head and which was conservatively appraised for at least $2.5 million. (TR 5/25, pp. 87-88, 92, 96), two yachts with values listed at $240,000.00 and $395,000.00 and six cars valued at $138,000.00. (Ex. P-86-A,). After hearing all of the evidence including Kamisugi's motives, her active participation in structuring the sale, and the value of her assets, the jury properly assessed punitive damages against her in the sum of $1,465,000.00.

B. Kamisugi's Brief Fails to Disclose Her Admission That The Listing of Old Pali Road Home with Libbie & Co. Created Fiduciary Duties for Her.

Kamisugi was the principal broker, the sole stockholder and president of Libbie & Co. (TR 5/18 pp. 118-119). Kamisugi obtained a real estate sales license in 1974 and her real estate broker's license in 1981. (TR 5/18 pp. 117-118).

Clyde Allison was a real estate agent and the vice-president of Libbie & Co. (TR 5/18, p. 123). As vice-president, Allison organized and conducted meetings, had managerial duties and was paid extra for these duties. (TR 5/18, pp. 165-167). Allison's background was in interior decorating and he had sold only one other property worth a million dollars. (Ex. P-54-A, p. 4, Ex. D-II-1, p. 13-14). Kuhnert first met Allison when Allison sold a neighbor's property on Poipu Drive and introduced himself as vice-president of Libbie & Company, Inc. (TR 6/6, p. 158).

On August 23, 1982, the Kuhnerts executed an Exclusive Right to Sell real estate listing contract with Libbie & Co. (Ex. P-9, App. E). Allison and Kamisugi suggested $1.7 million as the list price to the Kuhnerts and the Kuhnerts agreed. (TR 6/4, pp. 82-83).

At trial, Kamisugi volunteered the listing agreement was signed for her personally.

> Q. Does he sign it on behalf of Libbie & Company, Inc.?
>
> A. Yes, **for me**.
>
> Q. Fine.
>
> A. **It indicates for me**.
>
> Mr. Au. Okay. I would like to offer into evidence at this time, please, exhibit 9. (TR 5/18 p. 148) [Emphasis added].

Kamisugi admitted that the agreement created a fiduciary duty for every member of the brokerage.

> Q. All right. Would you agree that the signing of an exclusive right to sell listing form, similar to exhibit 9 in evidence, which you have before you by the client and the broker or the broker's representative, creates a fiduciary relationship as between the broker and the client?
>
> [Overruled objection omitted]
>
> A. Yes.
>
> Q. (By MR. AU) In other words, if there is one that is created, it's created with the signing of this document, exhibit 9. Is that correct?
>
> A. Yes. **We would be representing Mr. Kuhnert in the sale of his home. My**

company, Clyde and all of our other agents who might work on it.

(TR 5/18 p. 157) [Emphasis added.]

Kamisugi asserted that their fiduciary duty to the Kuhnerts started with the listing agreement and ended on August 1, 1983 when the Agreement of Sale was executed. (TR 5/22, pp. 144-145). However, Plaintiff's expert Goldman testified that the agency relationship and the fiduciary duty ended in this case when the Pali property was transferred in 1985 because the purpose of this agency was to provide the Kuhnerts cash from the sale of their Pali property. (TR 5/23, p. 23, 30, pp. 79-80).

The 5 bedroom Pali property with 50,000 square feet of land which had cost the Kuhnerts between $1.2 and $1.3 to purchase and renovate was marketed at $1.7 million for several months without success. Kuhnert agreed to lower the price by one-third to $1.3 million in order to get a cash deal. (TR 6/4 p. 78). Kamisugi testified that everyone in her office knew that Kuhnert wanted cash and not a condo. (TR 5/22, pp. 100-101).

The listing contract with Libbie & Co. was to expire on December 31, 1983 and could be cancelled with 30-days notice. (TR 5/18, pp. 151-152). By a letter dated June 1, 1983, Sherilyn Kuhnert notified Libbie & Co. of their intent to cancel the listing. (Ex. P-10, TR 5/18, p. 154). The jury could infer that Kamisugi and Allison wanted to effect a sale before the cancellation date of the listing agreement.

C. David and Darlene Osterman Wanted to Trade Up In A Slow Market.

David and Darlene Osterman were actively involved in real estate and in each transaction, Ms. Osterman agreed they were "trading up". (TR 5/16, p. 150). Darlene Osterman was a licensed, full-time real estate agent with Luke & Luke Realty, Inc. since 1980. As a licensed sales

person, she had completed Deposit Receipt Offer Acceptance forms, "DROA". (TR 5/16, p. 73).

The Ostermans lived in Punahou Regency penthouse 2, one of three penthouse units in the building. On December 15, 1981, the penthouse was appraised for $485,000.00, with all of the improvements. Punahou Regency penthouse number 3, which sold for $470,000 in July, 1981, was used as a comparable in the appraisal. (TR 5/16, p. 100, Ex. P-8). The Ostermans had a copy of the appraisal. (TR 5/16, p. 101). Darlene Osterman knew that the condominium market was flat. (TR 5/16, p. 75)

The Ostermans went to the Kuhnerts' Pali home on a Sunday open house showing by Libbie & Co. (TR 5/16, p. 105). Darlene Osterman (TR 5/16, p. 110) and Allison (Ex. D-11-1, pp. 40-41) each testified that the other person called one or two days later.

D. Kamisugi's Brief Fails, As She Failed In 1983, To Disclose She Knew That The Ostermans Could Not Afford The Pali Property.

The Ostermans told Allison they only had $100,000.00 in cash if they included their line of credit. (TR 5/16, p. 122). Although they admitted they could not afford the Kuhnerts' Pali home at $1.3 million, Allison still offered to work out a deal for the Ostermans. (TR 5/30, p. 116).

Kamisugi admitted she knew the Ostermans could not afford the Pali property before the DROA was drafted. (TR 5/22, pp. 69-70).

> Question: All right. Starting at line 10 "By Mr. Au," This is regarding how many times you talked to Clyde.
>
> "Question: (By Mr. Au) That's correct, how many times?
>
> Answer: Four million. About what?

Question: Going over the terms of the DROA before he actually drew it up.

Answer: He gave me information that if this sale was going to go through for Kuhnert, which he was very excited about, at a million three, which he was very excited about, that the only way the Ostermans could do it is if the condo were part of the contract.

Question: Why?

Answer: Why? **Because the Ostermans stated that they could not afford to buy this house for a million three.**

Question: Who said that?

Answer: The Ostermans." [Emphasis added.]

Kuhnert was never told by Kamisugi that the Ostermans could not afford to buy the Old Pali Road house. (TR 6/8, p. 506).

E. Kamisugi Discussed With Allison The Exchange Of The $485,000 Penthouse For The $1.3 Million House Before The Offer Was Made To Their Principal, Heinz Kuhnert.

An exchange was discussed as early as Monday or Tuesday that week because they knew they could not otherwise afford the Pali property. (TR 5/30, p. 35). Darlene Osterman (TR 5/16, pp. 120, 126) and Allison (Ex. P-54-A, pp. 13-15, Ex. D-II-1, p. 47) each testified that the other proposed an exchange.

Darlene Osterman testified that on Wednesday, after they had gone to the Pali property a second time, Allison went to look at the Ostermans' penthouse for about 20 minutes to see what it was worth. (TR 5/16, p. 136). The next morning, Allison told her that he had done a "market

survey" showing the penthouse was worth $1 million. (TR 5/16, p. 141). Contrary to Darlene Osterman's testimony, Allison asserted it was the Ostermans, and not he, who established the $1 million value for the penthouse. (Ex. P-54-A, pp. 23-24).

Allison's "market study" was actually limited to only one condominium, which he had seen earlier and which had a list price of $1 million, but had not sold. (Ex. D-II-1, p. 55). Allison did not inspect any properties in his "market study" other than the Ostermans'. When she was deposed, Kamisugi knew his study included only one other condominium. (TR 5/22 p. 81)

Kamisugi knew that Allison was "running around the office" prior to the meeting on June 23, 1983, "doing his homework" and getting comparables. (TR 5/22, p. 79, TR 6/1, p. 5). Kamisugi asserted that Allison did a reasonable, competent and diligent "market survey" of properties to "confirm" that the penthouse was worth $1 million. (TR 5/22, p. 26). She said "I probably discussed the approximate value of the condo with him. " (TR 5/22, p. 78).

Kamisugi admitted she had a fiduciary duty to diligently research the property her client intended to acquire. (TR 5/22 p. 25) There was no basis for the $1 million valuation. According to expert Dr. Michael Sklarz, no condominiums ever sold for $1 million in Honolulu from 1977 up through 1983. (TR 5/24, p. 149).

F. Kamisugi Participated In Structuring The Ostermans' Offer.

Kamisugi testified at trial that she first learned of the contract (DROA) when she met with Allison and the Ostermans at the Waikiki Yacht Club, the evening of June 23, 1983. (TR 5/22, p. 85). This assertion contradicted her prior deposition testimony that she did talk to Allison

about the terms of the DROA before it was written about "four million times". (TR 5/22, p. 69-70, 72).

Kamisugi knew the Ostermans were going to make an offer to Kuhnert before it occurred. (TR 6/1, p. 7). Kamisugi actively participated with Allison in structuring the contract. The following passage from Volume I, page 125 of her deposition was read to the jury:

> ..."Did you ever ask Clyde Allison if the apartment was worth, Punahou Regency, was worth $950,000 before you approved this DROA? Did you ask him? Answer, "**I had a number of discussions with Clyde Allison on how this contract was going to be structured**..."(TR 6/14 p. 131). [Emphasis added.]

When Kamisugi was asked if she suggested to Allison how to structure the deal before the June 23, 1983 meeting, she testified, "You know, I don't remember specific conversations, but it's highly probable that we did discuss that." (TR 5/22, p. 86).

G. Kamisugi Ratified Allison's Conduct Including Dazzling Kuhnert With His Footwork.

This seller financed transaction with the possibility that the Kuhnerts would have to take the penthouse was complex. Kamisugi said that Allison "tried very hard to dazzle him [Kuhnert] with his footwork" (TR 5/22, p. 32). She said she supported Allison's conduct in this transaction. (TR 5/30, p. 166).

On June 22, 1983, Allison called Mr. Kuhnert and said he found a wealthy couple, the Ostermans, to buy the Pali property. (TR 6/6, p. 138). Allison told Kuhnert that he and Libbie would be at a meeting scheduled for the next day at noon, June 23, 1983. Kuhnert said, but Kamisugi denied, that she called the next day and said she would try to attend the meeting. (TR 6/6, pp. 140-141).

On Thursday, June 23, 1983, the Ostermans met Mr. Kuhnert and Allison at the Kuhnerts' home on Poipu Drive. Although Darlene Osterman was fully capable of drafting the DROA, Allison wrote the offer on behalf of the Ostermans. (TR 5/16, p. 162). According to Goldman, Plaintiffs' expert, it was not acceptable practice within the real estate industry for the seller's agent to prepare a DROA for the buyer who was also a licensee. (TR 5/23 pp. 63, 64).

The offer price was $1.3 million, with $100,000.00 down and a two year agreement of sale. Under DROA paragraph 8, special provision 4, the Kuhnerts were to buy the Ostermans' Punahou Regency Penthouse 2 for $950,000.00. (Ex. P-11).

The Ostermans' penthouse had been appraised for $485,000.00 only 18 months earlier and the real estate market had been flat from 1979. With only $100,000.00 including the line of credit, the Ostermans had to value the penthouse at nearly $1 million to buy the Pali property which had a firm price of $1.3 million. (TR 5/31, pp. 30-31).

Kuhnert did not want a penthouse and had been told this was a "cash deal", so when he read the DROA he objected because he was obligated to buy the penthouse. (TR 6/6, pp. 165-166). Allison then added a line in the right hand margin of the DROA, "If not sold within 2 years of Agreement of Sale". (TR 6/6, p. 166). Allison and the Ostermans assured Kuhnert that there was no problem in selling the penthouse and guaranteed they would sell the penthouse within the two year period. (TR 6/6, p. 153, 166, TR 6/8, p. 508, 510).

The risk of the penthouse not being sold was imposed on the Kuhnerts because of Allison and Kamisugi's failure to properly advise Kuhnert. (TR 5/31, p. 115). Kamisugi never counseled Kuhnert about the risk of the

penthouse not selling in two years, despite her knowledge of the flat real estate market. (TR 5/22, p. 142).

Kuhnert asked if there were an appraisal on the penthouse and was told there was no appraisal. David Osterman emphasized that their penthouse was worth at least $1 million with the furniture. (TR 5/16, p. 145, TR 6/6, p. 153). Allison stated that he did a "market study" of other penthouses, without giving the details, and that the Ostermans' penthouse was the best property in the $1 million price range, and would be sold in two years. (TR 6/6, p. 154, 196) (TR 5/31, pp. 20, 24). The trial court found that "The evidence was that the plaintiff relied upon and was induced by such representations to enter into the transaction." (TR 8/29 p. 63).

The penthouse was valued at $950,000.00 on June 23, 1983, regardless of its value if not sold by August, 1985, the expiration of the Agreement of Sale. (TR 5/17, p. 128). Allison admitted this was not a prediction of future value. (TR 5/28, p. 29, Ex P-54A, pp. 40, 51)

Kuhnert never saw the penthouse until 1985 because he wasn't interested in buying it. He was shown pictures of the penthouse when the DROA was prepared and told that the penthouse included all of the furniture. (TR 6/6, 152, 194). He was told that the furniture alone was worth $100,000.00 (TR 6/8, p 557). Allison agreed under oath that the furniture was included with the penthouse. (Ex. P-54-A, p. 27, 39, 43). However, the DROA did not mention the furniture and at trial, all Defendants denied it was included in the sale.

The defense expert witness, Joy Jeffus, who had portions of Allison's sworn statement read to her, testified, "[I]n light of these statements, if Mr. Allison and Mr. Kuhnert and Mr. and Mrs. Osterman were all in agreement when this DROA was prepared, the furnishings should have been included." (TR 5/21, p. 54).

The DROA written by Allison provided no protection for the Kuhnerts and was totally in favor of the Ostermans. (TR 5/23, p. 86). Even Darlene Osterman acknowledged that they entered into this transaction only because they were presented with a "no-risk" situation. (TR 5/18, p. 81).

The DROA allowed for financing an additional $200,000.00 from Kuhnert, at 11% interest, if requested by the Buyer, the Ostermans. (TR 5/17, p. 74). This provision helped to make the deal, "more comfortable" for the Ostermans. (TR 5/17, pp. 76-77).

H. Despite Kamisugi's Knowledge Of The Bad Real Estate Market And Allison's Background In Interior Decorating, Not Appraising, Neither She Nor Allison Conducted A Reasonable Investigation Of The Penthouse's Value.

Kamisugi characterized this transaction as a deferred exchange and conceded that the penthouse's value was a significant factor in this transaction. (TR 5/22, p. 75). Of the three real estate professionals involved in this transaction, only Kamisugi had handled exchanges before. (TR 5/22, p. 104; Ex. 54-A, p. 56, TR 5/22, p. 140). Kamisugi testified she had been involved in at least five other property exchanges and that it was good to have appraisals of both properties. (TR 5/22, pp. 104-106). This principle was not followed for her clients, the Kuhnerts -- no one but Kuhnert asked about an appraisal.

Kamisugi admitted, in the context of the discussion of Kuhnert's appraisal of the Old Pali home, that if an appraisal had been performed, it would have to be disclosed.

> A. The reason is that under the code of ethics we are -- although our client's interests are primary, we are obligated to treat all parties to a transaction fairly. And, if we

have an appraisal done for the purposes of marketing, then we would be in a difficult position if a buyer asked us do you have a recent appraisal and we said, yes, but I'm not going to show it to you because it's lower than I want you to pay. That would be putting -- that would definitely be compromising our seller.

Q. So, when you refer to the code of ethics, you're referring to the provision that provides that in accepting employment as an agent the Realtor pledges himself to protect and promote the interest of the client, the obligation of absolute fidelity to the client's interest is primary. Is that the part you're referring to? [Overruled objection omitted.]

THE WITNESS: Excuse me. Then it goes on to say, however, you cannot do this to the extent that the other parties to the transaction are treated unfairly. It's not in exactly those words but pretty close. (TR 5/22 pp. 10-11)

Kamisugi testified that the real estate market in Hawaii began to go bad in 1979 and remained bad until 1987. (TR 5/22, p. 27-28). Plaintiffs' expert real estate broker Goldman testified that an appraisal goes "stale" when it does not reflect the market conditions. Because the real estate market had been flat since 1979, the 1981 $485,000.00 appraisal for the penthouse was still valid on June 12, 1983. (TR 5/28, pp. 31, 78). Dr. Sklarz also testified that because the market was flat up through 1983, the penthouse's 1981 $485,000.00 appraised value carried through to 1983. (TR 5/24, pp. 178-179).

I. Kamisugi's Brief Fails, As The Defendants Failed in 1983, To Disclose Osterman's Prior Waiver Of Commission, Which Kamisugi Justified Because Of $85,000 Owed To Her from Osterman's Brokerage.

Although Darlene Osterman was capable of writing the DROA on June 23, 1983, (TR 5/16, p. 169), she did not write out the offer and submit it through her own brokerage firm, Luke & Luke, because Allison told her that having only one Realtor would make the deal work. (TR 5/16, p. 162, TR 5/16, p. 170, TR 5/17, pp. 34-35).

> Question: Clyde Allison, when he told you that we should only have one Realtor in this transaction and not two, to make this transaction work. Did you believe him?
>
> Answer: Did I believe that we should only have one Realtor in the transaction?
>
> Question: Yes.
>
> Answer: I believe that when he told me that he could make the deal work with only having himself involved, yes, I believe that.
>
> Question: All right. Now, I'm going to ask you this question. It was his idea, right? He suggested it.
>
> Ms. Egli: Objection. Vague. Objection to the form of the question.
>
> Question: Did Mr. Allison suggest that only one Realtor should be involved in this sale and purchase, which is the DROA here?
>
> Answer: Yes.
>
> Question: Very well. Now, did you ever ask Mr. Allison why, what's the reason, that

> we should only have one Realtor involved in order to make the transaction work?
>
> Answer: Well, I think I explained it yesterday. he told me that because of his relationship with Mr. Kuhnert and their rapport and the confidence that Mr. Kuhnert had in him, that this would be something that would work better if he were the only Realtor involved in the deal.

The agreement that Allison would be the only licensee in the transaction and draft the offer for the Ostermans was made at the first meeting of the Ostermans and Allison. (TR 5/17, pp. 91-91, TR 5/21, p. 90-91). Osterman waived a 3% commission on the $1.3 million sale, or $39,000.00. (TR 5/16, p. 164).

Darlene Osterman did not even give Kuhnert one of her business cards. (TR 5/17, pp. 21-22). Even the Defendants' own expert witness, Joy Jeffus, testified that it should have been disclosed in writing that Darlene Osterman was a licensed real estate agent with Luke & Luke. (TR 5/21, p. 58).

Kamisugi testified that although Darlene Osterman was not authorized to waive the commissions on behalf of Luke & Luke, Kamisugi was justified in not discussing the commission waiver with Luke & Luke because Luke & Luke owed her $85,000.00 on a prior debt. (TR 5/30, p. 160).

J. The DROA Was Signed In A Rush Because Of Kamisugi's Yacht Race.

Kuhnert asked that his attorney review the DROA, but was told that Kamisugi was leaving that night and as the principal broker, she had to approve the DROA. (TR 6/6, p. 167, TR 6/8, p. 580).

Darlene Osterman also knew that Kamisugi was leaving that night. (TR 5/18, p. 102). Goldman testified that even if Kamisugi was leaving that night, she still had sufficient time before the meeting at the Waikiki Yacht Club, to have reviewed the DROA before it was signed by the parties. (TR 6/5, p. 32). Kuhnert disputed the testimony by the Defendants that he told them he was leaving the day after the meeting of Thursday, June 23, 1983, to go to Europe. Although Kuhnert was also leaving Hawaii, he did not leave until that weekend to join his wife on Catalina Island, California, for a vacation. (TR 6/6, pp. 145-146, TR 6/8, p. 579). Kuhnert was in no rush to have this transaction completed and so testified at trial. (TR 6/8, pp. 579-580).

K. Kamisugi Ratified Allison's Conduct. She Did Not Use A Meeting That Evening With The Ostermans To Conduct Any Investigation Because She Already Knew About the Deal. Allison Wanted Kamisugi to Meet Darlene Osterman That Night Because He Wanted Her To Join Them in Libbie & Company.

Around 7:00 p.m. that evening, the Ostermans met with Allison and Kamisugi at the Waikiki Yacht Club. (TR 5/17, pp. 165, 167). Darlene Osterman testified Kamisugi appeared to know about the transaction. Kamisugi did not ask how the value of $950,000 was obtained, had never been to the penthouse, had no written information about the penthouse, did not ask what was included in the sale of the penthouse, did not ask for an appraisal, did not ask what would happen if the condominium wasn't sold, and didn't ask about the financing of the deal. (TR 5/17 p. 167-173). Although she knew Osterman was a licensee, Kamisugi did not ask her about the commission. (TR 5/17 p. 184). Kamisugi did not recommend any changes to the DROA nor consult with Kuhnert when she reviewed it at the Waikiki Yacht Club. (TR 5/22, p. 55) Kamisugi approved the DROA and instructed Allison to open escrow.

From the lack of questions by Kamisugi at the meeting, and her own testimony about prior participation in structuring the deal, the jury could infer that Kamisugi was intimately familiar with the transaction including the commission waiver prior to the meeting with the Ostermans.

Kamisugi left that night for the Mainland to take 300 leis to a social function involving the Transpac yacht race. (TR 5/18, p. 140). She returned 11 days after the Transpac race began from California to Hawaii, probably between July 10 and July 14. (TR 5/18, p. 139).

L. Kamisugi's Brief Fails, As She Failed In 1983, To Disclose Material Information Of Her Conflict of Interest When Darlene Osterman Left Luke & Luke On June 30, 1983 To Join Libbie & Company, Inc.

The trial court found that "Evidence also showed that within a week or two after execution of the DROA and before the closing, Libbie Kamisugi approved the transfer of Darlene Osterman's real estate license to Libbie Kamisugi, Libbie and Company." (TR 8/29 p. 65). Kamisugi neither denied nor agreed that the transfer was agreed to on the evening of June 23, 1983. (TR 5/22 p. 153).

The records of the Professional & Vocational Licensing Division show Darlene Osterman resigned from Luke & Luke on June 30, 1983, one week after the DROA was signed and joined Libbie & Co. on July 7, 1983, before the DROA even closed. (Ex. P-65-A). Principal broker Kamisugi was then sailing from California to Hawaii. (TR 5/17, pp. 10-15).

Kamisugi's deposition testimony, Vol. I, page 114, line 23, which was read to the jury, was that she learned of the license when she returned from the race. (TR 5/22, pp. 151-152).

> Question: Were you aware when you met at the Waikiki Yacht Club that Darlene Osterman had a real estate license with Luke and Luke? Were you aware of that?
>
> Answer: I don't believe I was aware of that at that time.
>
> Question: When did you first learn that she was a Realtor at Luke and Luke?
>
> * * * *
>
> Answer: I probably learned of it, and this is a probably, when I got back from California and started -- Clyde started to discuss Darlene with me, and that he was hoping that she would consider coming with our company.

In direct contradiction, according to Darlene Osterman, at the Waikiki Yacht Club meeting, Kamisugi already knew that she worked at Luke & Luke but did not recommend that the DROA disclose that fact. (TR 5/17 p. 163-165). As principal broker reviewing the DROA, Kamisugi would have had to approve the cooperative brokerage commission split, if any, on the DROA form. (App. D). *Cf.* H.R.S. §467-14 (5).

Darlene Osterman did not dispute the public record (TR 6/1, p. 132), but denied having discussed transferring her real estate license to Libbie & Co., before the DROA was signed on June 23, 1983. Osterman's deposition testimony, read to the jury from Vol. III, p. 4, l. 12, was that she first discussed transferring her real estate license to Libbie & Co. in July 1983, **after** Kamisugi had returned from the Transpac race. (TR 5/17, pp. 12-13, p. 172) She did not phone Kamisugi long distance to discuss joining the company. (TR 5/17, p. 14).

Kamisugi had earlier testified in her deposition, Vol. I, page 33, line 14, read to the jury, that Darlene Osterman joined Libbie & Co. in August 1983. (Closing of the Pali home escrow was on August 1, 1983.)

> Question: When did Darlene Osterman join the company Libbie & Company as a saleswoman?
>
> Answer: I think it was around August of 1983.

At trial, after seeing Exhibit P 65-A, Kamisugi changed her testimony and said she first learned Darlene Osterman was a real estate agent at the Waikiki Yacht Club (TR 5/30, p. 158). Kamisugi then testified that the "main reason" Allison wanted her to meet the Ostermans that evening was because "he was thinking about inviting her to join our company if she wanted to." However, she denied any specific recollection of the subject. (TR 5/22 p. 151). She said she "Apparently" approved the transfer by phone from California before August. (TR 5/22, p. 154, p. 161).

Kamisugi's credibility in recalling the dates and events of this transaction was impeached by her inability to remember when she sailed from California in the Transpac race and when she arrived back in Hawaii, even though the time is measured down to the second **and she had won an award that year**. (TR 6/1, pp. 129-130). Kamisugi left California on her yacht about July 1. (TR 5/22, p. 156). At best, Kamisugi could only estimate that she returned to Hawaii between July 10 and July 14, 1983. (TR 5/18, p. 139).

No one told Kuhnert prior to closing that Darlene Osterman had joined Libbie & Co. The Defendants asserted disclosure of Darlene Osterman's status as a licensee, but Kuhnert was never told and also only learned after suit had been filed that Darlene Osterman waived her

share of the commissions. (TR 6/8, p. 643, TR 6/12, pp. 30-31, Ex. P-11).

M. Kamisugi's Brief Fails, As The Defendants Failed in 1983, To Disclose The Dual Agency Created When The Ostermans Listed The Penthouse With Libbie & Company In The First Week Of July, 1983.

The Ostermans gave Libbie & Co. an exclusive listing to sell their penthouse on July 7, 1983, the same day Darlene Osterman joined Libbie & Co. This was **prior** to the closing of the Kuhnerts' transaction on August 1, 1983. (TR 5/17, p. 186). At that point, Kamisugi admitted she owed fiduciary duties to both the Kuhnerts and to the Ostermans. (TR 5/22, pp. 146-147). There was no written consent from the Kuhnerts.

The Ostermans listed the penthouse with Libbie & Co. for $1.1 million furnished or $1 million unfurnished. Libbie & Co. had the listing from 1983 to 1985. (TR 6/1, p. 110). No offers were made on the property at the listing price during the listing period and the Ostermans never reduced the price below $1 million. (TR 5/17, p. 131).

Kuhnert was not told prior to closing about the penthouse listing. The newspaper advertisements (Ex. D-V) would not have been seen by Kuhnert because by then he had left Hawaii for vacation in California, then to Germany.

N. The Kuhnerts Suffered Damage Because Of Their Detrimental Reliance.

In August 1985, the penthouse was transferred to the Kuhnerts in accordance with the terms of the Agreement of Sale. The Kuhnerts did not receive any of the furniture in 1985 which had been promised to them in 1983. The Kuhnerts immediately listed the penthouse with another brokerage firm and finally sold the penthouse after it had

been marketed for four years for $625,000.00 in 1987. (TR 6/8, p. 636, Ex. P-27).

Of the $78,000.00 in commissions received from Kuhnert for the sale of the Pali property to the Ostermans, Kamisugi recovered the costs of advertising the Pali property and 35% of the $78,000.00 in commissions and Allison got the other 65% of the commissions. (TR 5/22, p. 88). Libbie & Co. received the listing for the penthouse and later Libbie & Co. listed the Pali property for the Ostermans. (TR 5/24, p. 58-59).

IV. COUNTER STATEMENT OF STANDARD OF REVIEW

The abuse of discretion standard applies to all discretionary decisions of lower courts. To constitute an abuse of discretion, it must appear that the court clearly exceeded the bounds of reason or disregarded rules or principles of law or practice to a substantial detriment of the party. ***Gakiya v. Hallmark Properties, Inc.***, 68 Haw. 550, 555, 722 P. 2d 460 (1986); ***Clarkin v. Reimann,*** 2 Haw. App. 618, 624, 638 P. 2d 857 (1981).

Verdict Form. (Point of Error A) A trial court's formulation of a special verdict form is discretionary and may be overturned only by a clear showing of abuse of discretion by the trial court. ***Fire Ins. Co. v. Pressed Steel Tank Co.***, 852 F. 2d 313 (7th Cir. 1988); ***Dreilling v. General Electric Co.***, 511 F. 2d 768 (5th Cir. 1975).

JNOV. The Court need not review any alleged error in the denial of the Defendants' "Motion for Judgment Notwithstanding the Verdict" because defense counsel failed to move for a directed verdict at the close of all evidence. (*See* TR 6/15 for the close of evidence.) H.R.C.P. Rule 50 (b) states

> Whenever a motion for directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is

> deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with the party's motion for a directed verdict...

A motion for a directed verdict at the close of all the evidence is a prerequisite for a motion for judgment N.O.V. ***Barre v. Mizoshiri***, 5 Haw. App. 624, 627, 706 P.2d 822 (1985), 5 Haw. App. at 627.***Stahl v. Balsara***, 60 Haw. 144, 150, 587 P. 2d 1210, 1215 (1978)

Plaintiffs do not agree that any alleged error is the subject of *de novo* review. The sufficiency of evidence (Points of Error B, C, D, E, F, G, and H) can not be the subject of review unless the motion for a directed verdict was made at the close of all the evidence. ***Sheraton Hawaii v. Poston***, 51 Haw. 142, 147, 454 P. 2d 369 (1969).

New Trial. (Point of Error F) If a new trial is denied, the issue on appeal is whether the trial court abused its discretion in denying the motion for new trial. ***Wiegand v. Colbert***, 68 Haw. 472, 718 P. 2d 788 (1976). The appellate standard for granting a new trial is that one party's evidence manifestly outweighs that introduced by the other party. ***Hoopii v. City and County of Honolulu***, 53 Haw. 564, 565, 498 P. 2d 630 (1972). If there is more than a scintilla to support the verdict returned by the jury, the reviewing court will not upset the denial of new trial. ***State v. Faulkner***, 1 Haw. App. 651, 654, 624 P. 2d 940 (1981).

Interest. (Point of Error I) An award of prejudgment interest is at the discretion of the trial court. Hawaii Revised Statutes § 636-16

Jury Instructions. (Points of Error J and L). In ***Eastern Star, Inc. v. Union Building Materials Corp.***, 6 Haw. App. 125, 138, 712 P. 2d 1148 (1985), the Hawaii Intermediate Court of Appeals said,

> "[T]he question on review of instructions is not whether they were technically correct but whether appellant could have suffered prejudice on their account. In determining the sufficiency of a particular instruction, it is not to be considered apart from its context, or the rest of the charge. [Citations omitted.]

Evidence. (Point of Error K) The admissibility of evidence and the scope of cross-examination are matters within the discretion of the trial court. ***Alt v. Krueger,*** 4 Haw. App. 201, 209, 663 P. 2d 1078 (1983).

Remittitur. (Points of Error M) In ***Kawamoto v. Yasutake***, 49 Haw. 42, 410 P.2d 976 (1966), the court held:

> It is not the function of the trial court nor of the reviewing court to substitute its judgment for that of the jury on the amount of damages unless the award is not supported by the evidence or so excessive or outrageous when considered with the circumstances of the case as to demonstrate that the jury in assessing damages acted against rules of law or suffered their passions or prejudices to mislead them.

V. QUESTIONS PRESENTED

A. Whether the trial court abused its discretion in denying judgment notwithstanding the evidence and a new trial when appellant failed to move for a directed verdict at the close of all evidence and failed to show the verdict was manifestly against the weight of the evidence of Kamisugi's direct participation in the breach of fiduciary duty and fraud?

B. Whether the trial court committed prejudicial error, in the giving of instructions which were agreed to, or the admission of evidence?

C. Whether the trial court abused its discretion in the form of the special verdict by listing Kamisugi, the corporation's president, with the corporation after correctly ruling that Libbie & Co., Inc. would be vicariously liable for any wrongful act of Kamisugi ?

D. Whether the trial court abused its discretion in denying complete remittitur of compensatory and punitive damages when the jury found there was clear and convincing evidence of intentional fraud and breach of fiduciary duty?

E. Whether the trial court abused its discretion when it awarded prejudgment interest?

VI. ARGUMENT

A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO GRANT JNOV OR A NEW TRIAL WHEN THERE WAS SUBSTANTIAL EVIDENCE OF KAMISUGI'S ACTIVE PARTICIPATION IN THE FRAUD.;

1. Kamisugi Had A Fiduciary Duty To The Kuhnerts.

An agency relationship is

> a consensual fiduciary relation between two persons, created by law by which one, the principal, has a right to control the conduct of the agent, and the agent has a power to affect the legal relations of the principal.

Restatement (Second) of Agency *§1*(1958)

> "If a broker has a listing (open or exclusive), then the broker and all the salespeople in that firm represent the seller in a fiduciary capacity." Reilly, ***Agency Relationships in Real Estate***, (1987) at 78

In ***Silva v. Bisbee***, 2 Haw. App. 188, 190, 628 P.2d 214 (1981), the Intermediate Court of Appeals found that both the individual real estate salesperson, Bisbee, and the brokerage, Midkiff Realty, Inc. were in a fiduciary relationship to the Plaintiffs.[2]

The Rules of the Real Estate Commission §16-99-3(n) (App. F) then in effect provided that the principal broker at any office "shall be immediately responsible for the real estate operations conducted at that place of business." *See* ***Grant v. Cuomo***, 396 N.Y.S. 2d 524, 58 A.D. 2d 251 (1977) ***Phillips v. JCM Dev. Corp.***, 666 P. 2d 876 (1983) (Judgment against corporate brokerage, principal broker and salesperson affirmed for breach of fiduciary duties). Kamisugi conceded under H.R.S. §467-14(10) that the corporate brokerage must be actively managed by an officer who holds a real estate broker's license as she did. Kamisugi's own testimony was that she and everyone in her firm, owed a fiduciary duty to the Kuhnerts. This admission showed a correct understanding of the law of agency.

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[2] ***Vicki Bagley Realty, Inc. v. Laufer***, 482 A.2d 339 (D.C. App.1584) cited by Kamisugi is not on point. The individual sales agents were not named as party defendants.

The fact that Allison signed the listing agreement for Kamisugi did not make either Allison or Libbie & Co. the sole agent for the Kuhnerts. As president and principal broker of the corporation Libbie & Co., Libbie Kamisugi was a sub-agent of the Kuhnerts, and owed to the clients, the same fiduciary duties of utmost honesty, loyalty, and diligence. ***Mersky v. Multiple Listing Bureau of Olympia, Inc.***, 437 P.2d 897,899 (WA, 1988).

2. The Fiduciary Duty Included Disclosure Of All Material Facts Concerning The Transaction To The Kuhnerts.

> The Rules of agency apply to the relationship between a real estate broker and principal. The law imposes upon a real estate broker a fiduciary obligation comprised of utmost good faith, integrity, honesty, and loyalty, as well as a duty of due care and diligence. In particular, a real estate agent has a duty to make a full, fair, and timely disclosure to the principal of all facts within the agent's knowledge which are, or may be material to the transaction and which might affect the principal's rights and interests or influence his action. "Unless otherwise agreed, an agent is subject to a duty to use reasonable efforts to give his principal information which is relevant to affairs entrusted to him and which, as the agent has notice, the principal would desire to have . . . ." ***Restatement (Second) of Agency*** § 381 at 183 (1958).
>
> ***Property House Inc., v. Kelly***, 68 Haw. 371, 377 ,715 P. 2d 805 (1986) [Citations omitted].

A real estate licensee has an affirmative duty to disclose all material facts to her client.[3] Material facts are all facts within the agent's knowledge which could be reasonably calculated to influence the principal's actions. ***Hercules v. Robideaux, Inc.*** 110 Wis 2d 369, 319 N.W. 2d 240 at 242(1982).

3. The Failure Of A Real Estate Licensee To Fulfill Her Affirmative Duties To Disclose Material Information Is A Breach of Fiduciary Duty and Fraud.

> The broker's principal is justified in relying on representations of his broker because of the broker's duty to exercise reasonable skill and diligence. It is a breach of fiduciary duty to fail to disclose or to misrepresent a purchaser's financial information. *Philips v. JCM Dev. Corp., supra.*.

The jury was properly instructed on the elements of the Kuhnerts' claims of fraudulent misrepresentation and fraudulent concealment by Jury Instructions number 24 and 29. (App. G) in accord with ***Kang v. Harrington***, 59 Haw. 652, 656, 587 P.2d 285 (1978), which outlined the elements of fraud.

> To support a finding of fraud, it must be shown that the representations were made and that they were false, that they were made by the defendant with knowledge that they were false, (or without knowledge whether

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[3]Real Estate Commission Rule 16-99-3(c) (App F), then in effect, provided, a stronger duty than "material" fact:

> The licensee shall ascertain and disclose all pertinent facts concerning every property for which the licensee accepts the agency, so that the licensee may fulfill its obligation to avoid error, misrepresentation or concealment of pertinent facts.

they were true or false) and in contemplation of the plaintiff's relying upon them and also that the plaintiff did rely upon them.

A statement is fraudulent if it is falsely made, or caused to be made with the intent to deceive. ***Cosmopolitan Financial Corp. v. Runnels***, 2 Haw. App. 33, 39, 625 P.2d 390 (1981). Fraud consists of intentional deceptions and also false and fraudulent misrepresentations. If a party to a transaction has superior knowledge, or knowledge that is not available to the other party, that party is under a legal duty to speak and silence under these circumstances, constitutes fraud. 37 **Am Jur** 2d ***Fraud and Deceit*** § 148.

For silence or concealment to be actionable fraud, it must relate to a material matter known to one party and a duty to disclose this to the other party which arises from a relations of trust or inequality of knowledge. ***Hobart v. Hobart Estate Co.***, 26 Cal.2d 412, 159 P.2d 958, 970 (1945).

Under Real Estate Commission Rule §16-99-3(h), (EX 53 (A), App F) a licensee acting as a principal in the sale or purchase of real estate must disclose the fact of such licensure in writing. In ***Silva v. Bisbee***, *supra*, the court upheld the finding of constructive fraud when a real estate agent failed to disclose her interest as a buyer to the seller, her clients. The purpose of requiring disclosure that a party is a licensed real estate agent is to avoid overreaching and of taking advantage of the non-licensed party.

A material fact which must be disclosed is the financial condition of the purchaser. ***Vicki Bagley Realty, Inc. v. Laufer***, 482 A. 2d 359 (D.C. App. 1984).

In ***Schoenberg v. Romike Properties***, 251 Cal App 2d 154, 59 Cal Rptr 359 (1967, 2d Dist.) three real estate sales agents and the brokerage they were associated with were found to have breached their fiduciary duty and

committed constructive fraud by misrepresenting the value of the purchaser's property to their client, the vendor, who took a worthless trust deed on the purchaser's property as security for the installment purchase of vendor's property. The court stated that the statement of the value of the purchaser's property was not mere opinion but the statements of experienced brokers with knowledge far superior to that of their client, the vendor. As their agents, the brokers had a duty to investigate the property to learn its value and the plaintiffs could have reasonably believed that the brokers had made a reasonable investigation and the statements could be relied on. The court also found that the brokers had concealed the fact that they had no knowledge of the value of the property and that even if they believed they were acting in the best interest of the plaintiffs, their gross neglect made them liable for constructive fraud. 251 Cal. App. 2d at 162. ***See Also, Smith v. Carroll Realty Company***, 8 Utah 2d 356, 315 P.2d 67 (1959).

A dual agency is a material fact which must be disclosed and consented to. ***Property House Inc., v. Kelly***, *supra*.

4. Kamisugi Concealed Material Information From Her Clients.

The evidence before the jury was that Kamisugi knew and concealed the fact that the Ostermans could not afford to buy the Pali property for $1.3 million; ratified Allison's misrepresentation of the value of the penthouse to be $1 million in a declining real estate market on the basis of his cursory investigation; knew that Allison relied on Darlene Osterman's valuation of the penthouse of $1 million; discussed with Allison "four million times" the structuring of the deal for the Ostermans before the DROA; concealed the fact that Darlene Osterman was a licensed real estate agent with Luke & Luke; failed to disclose that Darlene Osterman was entitled to, but waived her share of the commissions; knew that only one Realtor was involved so that Allison could "dazzle" Kuhnert to make this deal

work; knew but failed to disclose to Kuhnert that Darlene Osterman transferred her license to Libbie & Co. before the Kuhnerts DROA closed on August 1, 1983; knew but failed to disclose that Kamisugi got the listing for the penthouse the **same day** Darlene Osterman transferred her license to Libbie & Co.

A dual agency was created, when Allison, Kamisugi and Libbie & Co., began to represent the Ostermans' interests, which were in direct conflict with the Kuhnerts. This dual agency with the Ostermans began when Allison offered to help them work out a deal when they told him they couldn't afford the house although the Ostermans didn't need his help with their experience in real estate.

> If a buyer requests a broker's assistance in obtaining a particular piece of property, the broker may be held to be the buyer's agent for that transaction, even though the broker is paid nothing by the buyer and it is expected that he will receive a fee from the seller.
> *Duffy v. Setchell*, 38 Ill. App. 2d 146, 347 N.E. 2d 218, 221 (1976)

From viewing the evidence, the trial court said,

> The problem the Court has is that it is clear to the trier of fact that that condo couldn't have been sold at 950 and bearing in mind what happened subsequently of which the trier of fact will be informed, namely, that Kuhnert finally sold that unit at 650 -- 625, the trier of fact is going to -- is well able to make its inferences to whether they were in good faith or bad faith...
> (TR 5/16, p. 122)

It is no defense for Kamisugi to claim that she allowed Allison to represent the value of the penthouse

because they were merely passing on information from the Ostermans in good faith. This was a defense raised in ***Schoenberg***, *supra*. The court there said that even if the salespersons believed the statement of value to be true, they concealed the fact that they had no knowledge of the property, violated their duty of investigation, and breached their duty of utmost good faith. The court held that even if uttered without fraudulent intent, the representation of value amounted to constructive fraud. 251 Cal. App. 2d at 162.

The timing of Osterman's leaving her firm and the listing with Libbie & Company on June 30, 1983 and Kamisugi's departure on the night of June 23, 1983, to California, could reasonably lead to the jury's inference that Osterman's move was discussed, like the commission waiver, (TR 5/21 p. 90) even before the drafting of the DROA on June 23, 1983. Kamisugi admitted as principal broker that she personally approved Osterman's move to her firm but said she did it by phone from California.

The form DROA used in the transaction provided for payment of a cooperating broker's commission on the document itself and Kamisugi instructed Allison to open escrow the next day. The jury could reasonably infer that Kamisugi personally knew of, on June 23, 1983, and profited from the waiver of commission which was not disclosed to the Kuhnerts. Kamisugi had a personal motive to increase her commission on the sale of the Kuhnert house through waiver of the Luke & Luke share because Kamisugi was owed $85,000 on a prior debt. (TR 5/30, p. 160). Where a broker benefits from a sales agent's breach of fiduciary duty, the broker cannot disclaim responsibility for his acts. ***Frederick v. Squillante***, 144 So. 2d 848, 849 (App. 2nd Dis. Fla, 1962).

5. The Kuhnerts Detrimentally Relied on Kamisugi's Deliberate Non-Disclosures.

Even without considering the exact price set for the Punahou penthouse, the jury could infer that Mr. Kuhnert

would not have accepted the Agreement of Sale on August 1, 1983, if he had been told the following material facts which Kamisugi failed to disclose.

> 1) The Ostermans cannot afford the Pali house without a high valuation of the penthouse.
>
> 2) Osterman is a licensee.
>
> 3) Within one week of the DROA's signing, Osterman will be leaving her brokerage and will give the listing on the penthouse to Libbie & Company.
>
> 4) Osterman is waiving her commission so that the commission to Libbie & Company will be increased. Libbie & Company can justify this because Luke & Luke owe Libbie Kamisugi on a prior debt.
>
> 5) Osterman will join Libbie & Company before closing.

The acceptance of the listing, the waiver of commission, Osterman's joining of her firm, and the submission of the DROA to escrow required Kamisugi's personal knowledge and consent as principal broker. Her knowledge and consent were admitted. The jury's finding under the clear and convincing standard that Kamisugi herself defrauded her clients was supported by substantial evidence.

Reasonable reliance is a question of fact for the jury. ***Phillips v. JCM Dev. Corp.***, supra. When a real estate agent represents that he has investigated the value of a property in an exchange, his client is not required to investigate the value independently and may rely on the agent's statement. ***Smith v. Carroll Realty Co.***, *supra*. If these disclosures had been made, there is no doubt that Kuhnert would <u>not</u> have relied on the representation of the

penthouse's value. *See, Perkins. v. Betty Thorpe*, 106 Idaho 138, 676 P. 2d 52 (App., 1984).

6. The Jury Found By Clear And Convincing Evidence That Kamisugi Actively Participated In, Authorized And Ratified The Acts And Omissions To Defraud The Kuhnerts.

The jury was instructed by Jury Instruction Number 9 (App. G), that the burden of proof required to prove fraudulent misrepresentation and fraudulent concealment was clear and convincing evidence. They were instructed by Jury Instruction number 21 (App. G) that the officers, directors or shareholders of a corporation are personally liable for tortious conduct of the corporation or its agents if they authorized, ordered, participated or ratified the tortious conduct.

[T]he deterrent or retributive effect of punitive damages must be placed squarely on the shoulders of the wrongdoer. A wrongdoer in this context includes a person superior in authority to expressly authorize, ratify or condone the tortious act of the employee. ***Lauer v. Young Men's Christian Association of Honolulu***, 57 Haw. 390, 402, 557 P.2d 1334 (1976).

The jury found that the Kuhnerts had been defrauded by Allison, Kamisugi, Libbie & Co. and the Ostermans by clear and convincing evidence, and by the same standard assessed punitive damages against each Defendant in an amount designed to punish and deter similar conduct by others.

7. The Breach OF Fiduciary Duty And Fraud Caused Damage To The Kuhnerts.

The evidence was that the Kuhnert's sold their home, which with renovations cost them $1.3 million and was appraised in 1981 at $1.3 million (TR 6/4, pp. 79-80) in the exchange for the grossly overpriced Osterman

penthouse. They were supposed to receive the furniture, which Darlene Osterman said cost $30-40,000 (TR 5/16, pp. 79-80) but did not.

In ***Shaffer v. Earl Thacker Co., Ltd.***, 6 Hawaii App. 188, 191, 716 P. 2d 163 (1986), the court held that a licensee is liable to a buyer for negligent misrepresentation, citing ***Restatement (2nd) of Torts*** (1977) §552:

> One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

The dual agency of Libbie & Co. should also have deprived Libbie & Co. of the right to receive the $78,000 in commission.

> A dual agency is therefore permissible only where the agent obtains the consent of both principals after full disclosure. . . Section 391, ***Restatement (Second) of Agency (1958)***, entitled "Acting for Adverse Party without Principal's Consent" provides: "Unless otherwise agreed, an agent is subject to a duty to his principal not to act on behalf of an adverse party to a transaction connected with his agency without the principal's knowledge." The underlying reason for the rule is the public policy to prevent fraudulent conduct. ***Property House***, *supra*, at 68 Haw. 378 [citations omitted.]

As a consequence of the dual agency, under the holding of ***Property House Inc.***, *id.*, the dual agency deprived Allison, Kamisugi, and Libbie & Co. of the right to any commission.

8. There Is No Immunity For Real Estate Licensees For Liability For Their Fraud Or Deceit As Frivolously Argued By Defendant.

Defense counsel raises a frivolous argument that the legislature intended that real estate licensees employed by corporations are not personally liable for their wrongful acts. Haw. Rev. Stat. §467-16 et seq. provided for a Real Estate Recovery Fund to which all individual licensees must contribute. Haw. Rev. Stat. §467-16 and -18 provided the procedure for recovery from the fund by any person aggrieved by an "act, representation, transaction, or conduct of a duly license real estate broker, or real estate salesman, upon the grounds of fraud, misrepresentation, or deceit" who has obtained an uncollectible court judgment. (App. H). If there were immunity, there would be no judgment.

B. THERE WAS NO ERRONEOUS INSTRUCTION OR ADMISSION OF EVIDENCE. ANY APPEAL ON THE INSTRUCTIONS WAS WAIVED BY DEFENSE COUNSEL'S AGREEMENT.

Kamisugi raised as points of error the giving of Plaintiffs' Proposed Instruction 155, as modified, Jury Instruction Number 22 (Error J) and the Court's own proposed instruction 57, as modified, Jury Instruction 31. (Error L).

Plaintiffs' Proposed Instruction 155/ Instruction 22

If several persons combine and conspire to effect a common object, and it is arranged

that each shall do certain acts and perform certain parts, with a view to the attainment of the same common result, and an overt act is committed in furtherance of the common object, all will be responsible for the acts of each of them.

Proposed Instruction 57/ Court's Instruction 31.

The Plaintiffs claim that Defendants Libbie & Company, Inc., Libbie Kamisugi, and/or Clyde Allison breached a fiduciary duty to the Plaintiffs. To recover damages for breach of fiduciary duty, the Plaintiffs must prove each of the following:

1. That a Defendant breached a fiduciary duty to the Plaintiffs;

2. That a Defendant breached a fiduciary duty owed to the Plaintiffs; and

3. That Plaintiffs suffered damages as a result of said breach of fiduciary duty.

1. The Defendant Failed to Preserve Any Appeal Under H.R.C.P. Rule 51 By Counsel's Agreeing To The Instructions And Violated H.R.A.P. 28 (b)(4)(B) By Failing To Admit This In Her Opening Brief.

H.R.A.P. Rule 28 (b)(4)(B) was not satisfied in the Statement of Points of Error.

When the point involves the charge of the court, there shall be set out the specific words of the part referred to, whether it be instructions given or refused, **together with the objections urged at trial**. [Emphasis added.]

Failure to set forth the objection in the brief in itself, is sufficient grounds for refusing to consider the claimed error. ***State v. Shon***, 47 Haw. 158, 169, 385 P. 2d 830 (1963). Kamisugi's Statement of Points of Error, deceptively cites the charge to the jury but fails to inform the Court that defense counsel agreed to the giving of the instructions. (TR 6/15, pp. 7-8 re: Court's Proposed Instruction 57 and p. 18 re: Plaintiffs' Proposed Instruction 155).

Hawaii Rules of Civil Procedure (H.R.C.P.), Rule 51(e) provides:

> No party may assign as error the giving or the refusal to give, or the modification of, an instruction, whether settled pursuant to subdivision (b) or subdivision (c), of this rule, unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. [Emphasis added]

The Defendants failed to meet the threshold requirement of H.R.C.P., Rule 51(e) by stating any objection to the instructions, prior to the jury retiring for deliberation.

A party may not assign error to the giving of an instruction unless he objected and stated the grounds for his objection. ***S & W Crane Service, Inc. v. Berard's Dependents***, 53 Haw. 161, 489 P.2d 419 (1971) An appellant may not complain for the first time of an error to which he acquiesced or failed to object at trial. ***Okuhara v. Broida***, 51 Haw. 253, 255, 456 P.2d 228 (1969). "[A] party will **not** be allowed on appeal to claim error in the giving of an instruction which was given by agreement." ***In re Estate of Coleman***, 1 Haw. App. 136, 615 P.2d 760 (1980) [Emphasis added].

Even if erroneous, errors in procedure that were invited by a party cannot be argued on appeal by that party. ***Struzik v. City and County of Honolulu***, 50 Haw. 241, 245, 437 P.2d 880 (1968). The Defendants agreed to Instruction 22 and Jury Instruction 31, and cannot claim error on appeal.

2. Instruction 22 Was A Correct Statement Of The Law of Fraud. Civil Conspiracy Does Not Exist As An Independent Tort.

The Defendants received copies of the Plaintiff's Proposed Jury Instruction, which explicitly identified the citation for instruction 22 as "37 **Am Jur 2d**, ***Fraud and Deceit*** § 305". (Plaintiff's Proposed Jury Instruction 155, App. G).

The passage from which the Plaintiffs' obtained Instruction 22 sets forth the proposition that individuals are liable if they act in concert with others to perpetrate a fraud: "One who participates in a fraud is of course guilty of fraud, and one who with knowledge of the facts, assists another in the perpetration of a fraud is equally guilty". 37 **Am Jur 2d** ***Fraud and Deceit*** § 305.

This was not a "conspiracy instruction" as alleged by the Defendants. The Plaintiffs never alleged civil conspiracy nor was the jury required to make this finding. The special verdict form was limited to the torts of fraudulent misrepresentation, fraudulent concealment and breach of fiduciary duty.

In ***Ellis v. Crocket***, 51 Haw. 45, 57, 451 P.2d 814, 822-23 (1969), the Court held, "[A]lthough the tort of 'conspiracy' has not been clearly defined, it is clear that there can be no civil claim based upon a conspiracy alone." (emphasis added) *See* Prosser, ***The Law of Torts*** § 46, at 293 (4th ed. 1971). (The gist of the action is not the conspiracy charged, but the [independent] tort working damage to the plaintiff.)

The jury was not asked to find whether there was a "civil conspiracy" among the Defendants. The jury was instructed to consider the actions of each Defendant, and if there was a common objective to defraud the Plaintiffs, then each Defendant, by her own actions could be liable for fraud.

Kamisugi claims the giving of this instruction was plain error because it did not specify the standard of proof for "civil conspiracy" by "clear and convincing evidence". However, the jury was properly instructed that the burden of proof for fraud was clear and convincing evidence by jury instruction number 9.

In ***Armstrong v. Cione***, 6 Haw. App. 652, 660-61, 736 P.2d 440 (1987), the Hawaii Intermediate Court of Appeals held:

> Both in civil and criminal cases, the instructions of the court must be read together as one connected whole, to ascertain whether they correctly declare the law. The omission of inaccuracies of one instruction may be cured by the content of the other instructions, or some of them, and if, when the instructions of the court are considered as a whole, they correctly state the law and are not inconsistent or misleading, the fact that a particular instruction or isolated paragraph may be objectionable, as inaccurate or misleading, will not constitute grounds for reversal. (citations omitted)

When all the instructions are read as a whole, the jury was properly instructed on the claims for fraudulent misrepresentation and concealment and the required burden of proof.

3. INSTRUCTION 31 WAS A CORRECT STATEMENT OF THE LAW CONCERNING FIDUCIARY DUTY AND VICARIOUS LIABILITY.

Kamisugi claims that the instruction 31 on breach of fiduciary duty improperly created vicarious liability in all Defendants for the breach by one. The instruction on fiduciary duty is a correct statement of the law and was stated in the alternative, so that the jury would consider whether "defendants Libbie & Company, Inc., Libbie Kamisugi, and/or Clyde Allison" breached their fiduciary duty to the Plaintiffs. The jury was given the opportunity on the special verdict form to specify whether Clyde Allison or Libbie Kamisugi or both breached their fiduciary duty to the Plaintiffs. There was no plain error by these instructions being presented to the jury. The judge correctly ruled as a matter of law that Libbie & Co. was vicariously liable for the wrongful acts of Vice-President Allison or the wrongful acts of President Kamisugi.

The instructions to the jury were not erroneous statements of the law nor were they prejudicial. There was no plain error by the trial court's reading these instructions. In ***Leyson v. Steurmann***, 5 Haw. App. 504, 519, 705 P.2d 37 (1985), the court said, "[T]he plain error rule is not for purpose of relieving party from free, calculated and deliberate choices he has made to forego objecting to alleged errors at trial."

4. The Alleged Error Of Admission Of Evidence About The Ostermans' Listing Of The Pali Property Was Not Argued So It Must Be Disregarded.

Kamisugi failed to present any question or argument regarding the alleged error of the court's admission of testimony of the listing of the Pali property for $4.1 million. Under H.R.A.P. 28 (b) (6) the point of error must be disregarded. Points not argued in a brief are deemed

abandoned and waived on appeal. ***Berkness v. Hawaiian Electric Co.***, 51 Haw. 437, 438, 462 P.2d 196 (1969). In any case, the evidence was relevant and not prejudicial.

C. KAMISUGI DID NOT OBJECT TO THE VERDICT FORM'S LISTING OF HER NAME WITH THE CORPORATION OF WHICH SHE IS PRESIDENT. SHE WAS NOT PREJUDICED BY THE FORM WHICH WAS BASED ON THE TRIAL COURT'S CORRECT RULING.

Counsel for the Defendants and Plaintiffs reviewed the special verdict form proposed by the trial court and approved the special verdict submitted to the jury. (TR 6/15, pp. 20-22). Kamisugi now claims on appeal that the special verdict form was defective and provides the basis for a new trial. However, the trial court correctly found that the Defendants waived any objection to the form of the special verdict. The Defendants cannot now claim error, having expressly waived any objection to the form of the special verdict.

1. Kamisugi Fails to Address The Trial Court's Correct Ruling That Defendants Waived Their Specific Objection To The Special Verdict Form.

The Hawaii Rules of Civil Procedure, Rule 49(a), provides:

> **Special Verdicts.** The court **may** require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. . . . The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact

> raised by the pleadings or by the evidence, **each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury**. As to an issue omitted without such demand the court may make a finding; or, it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict. [Emphasis added]

At trial, the Defendants' only concern about the special verdict form related to the possibility in question 6 of Libbie & Company paying double punitive damages, once for Allison and once for Kamisugi. (TR 6/15, p. 20-22). There was no objection voiced about Questions 1, 2, 3, and 4, each of which listed Kamisugi with Libbie & Co., on liability for fraud and breach of fiduciary duty

> THE COURT: All right. Ms. Egli?
>
> MS. EGLI: Thank you, Your Honor. The defendants would like to note that the court has, in the verdict form, listed Clyde Allison together with Libbie & Company and, also, Libbie Kamisugi together with Libbie & Company. We understand that it's the court's feeling that they are both officers of the company and that the company, acting through them, should be listed as such. Therefore, when we get to item 6 in the form where it assess -- or asks the jury to assess punitive damages, **there's a possibility of double recovery from Libbie & Company with respect to punitive damages**. It is our understanding that the court takes the position that it will handle that matter if it becomes necessary after the verdict is returned.

THE COURT: When you say the court takes that position, Ms. Egli, the court has stated to counsel, and will state on the record that it is of the belief and will hold as a matter of law that, if Clyde Allison or Libbie Kamisugi is liable for punitive damages, then the corporation, Libbie & Company, is liable for punitive damages without the requirement that the corporation had to have authorized, ratified, or participated in the wrongful act which gives rise to punitive damages. The reason the court makes this ruling is because **the court is of the opinion that, as a matter of law, both Clyde Allison, who is a vice-president or an acting vice-president of Libbie & Company, as well as Libbie Kamisugi are high enough in the management of the company so that the company becomes responsible even for punitive damages by reason of the acts of these corporate officers.** Now, accordingly, the court has added Libbie & Company after the individuals. **The other option is to leave Libbie & company out completely from the verdict form and have the court simply rule as a matter of law that, if the jury returns a verdict assessing punitive damages against any of these individuals, the court will simply rule as a matter of law that the corporation is also liable. That's the other option. Is there anybody here who wants that option without prejudice to your objection as to the legal theory?**

MS. EGLI: No, Your Honor.[4]

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[4]Defendant neglected to cite this waiver of an opportunity to not list Libbie & Co. on the verdict form in her Opening Brief. Now, on appeal, this

THE COURT: All right, so without prejudice to your objection that the corporation be vicariously liable for punitive damages by reason of the conduct of these individuals, **you don't object to Libbie & Company being in the verdict form in the form that it's in?**

MS. EGLI: **No, Your Honor.**

MR. AU: May I note something for the record on this point, your honor.

Court: Yes.

MR. AU: In the proposed special verdict form that we went over before arriving at this, I wish to note that Libbie & Co. Inc. was given a separate line. But because we were concerned that the jury might double the damages then -- double the damages -- that this was the reason we went this route...

The trial court, after his review of the June 15 transcript of the settlement of the jury verdict (TR 8/29 p. 5)[5], correctly ruled that the Defendants waived their objection to the listing of Libbie & Co. with each of its executives. (TR 8/29, 00. 65-66).

An objection to a verdict form must be specific with respect to a particular issue. ***Rose Confections, Inc. v. Ambrosia Chocolate Co.***, 816 F.2d 381 (8th Cir. 1987). A party who does not object to any ambiguities in a special interrogatory cannot attack the wording on appeal. ***Geosearch, Inc. v. Howell Petroleum Corp.***, 819 F.2d 521 (5th Cir. 1987)

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opportunity is apparently what Defendant asserts should have been accepted. No one claims the transcript is wrong.

[5]The court perceptively summarized on 8/28/90 at 45-46 that "the only objection was made to protect not Allison or Libbie Kamisugi personally but the corporation [which] would be subjected to a double recovery..."

Objections to the form of a special verdict must be made before a jury retires, and the failure to do so, waives all objections. ***Latuso v. Uniroyal Inc.***, 783 F.2d 1241 (5th Cir. 1986); ***J.C. Motor Lines, Inc. v. Trailways Bus Systems, Inc.***, 689 F.2d 599 (5th Cir. 1982); ***Nimnicht v. Dick Evans, Inc.***, 477 F.2d 133 (5th Cir. 1973); ***Peckham v. Continental Casualty Co.***, 895 F.2d 830 (1st Cir. 1990);. A party who fails to object at trial to the omission of an issue in special interrogatories or to the form of special interrogatories cannot object for the first time on appeal ***Pielet v. Pielet***, 686 F.2d 1210 (7th Cir. 1982) cert. den., 459 U.S. 1107, 103 S.Ct. 733, 74 L.Ed.2d 957 (1983).

The Defendants also waived a second opportunity at trial to object when the jury returned with their verdict. After polling the jury, the Defendants failed to ask for a clarification of the award by the jury and instead allowed the jury to be discharged.*See* ***Lockard v. Missouri Pac. R.R.***, 894 F.2d 299 (8th Cir. 1990); ***Cindiff v. Washington***, 393 F.2d 505 (7th Cir. 1968)

> [W]here no objection to the trial of equitable issues as well as legal issues by a jury is made, the jury's verdict on the issue submitted to it should stand unless the evidence was legally insufficient to support it. ***Kimball v. Lincoln***, 72 Haw. 117 (1991).

2. Any Error In The Special Verdict Form Was Invited By The Defendants.

The Defendants specifically declined the opportunity to have Libbie & Co. left off the verdict form (and the court's later award of judgment against Libbie & Co. for vicarious liability), but now complain of the Libbie & Co.'s joint listing with Allison and Kamisugi. Any alleged error was invited error.

In ***Kawamoto v. Yasutake***, supra at 49 Haw. 52, after several jury questions to which the defendant stipulated to the answers, the jury returned a verdict of $350.00 in special damages. The defendant contended that the "[V]erdict is defective and must be set aside in its entirety since it indicates the jury was guided by passion, prejudice and unaccountable caprice." The court held that by stipulating that these questions should be answered affirmatively, "the defendant invited the larger verdict," and refused to set aside the verdict.

3. As Shown By The Differing Amounts of Punitive Damages Awarded, The Jury Followed The Court's Instructions and Considered Kamisugi and Allison Separately In Completing the Special Verdict Form.

The appellate court must respect the jury's verdict and award of damages because the special verdict form appropriately addressed the issues of the case and was clearly understood by the jury. In an action which is triable to the jury as a matter of right, the jury's verdict is final and binding. ***Board of Directors of Ass'n of Apartment Owners of Regency Tower Condominium Project v. Regency Tower Venture***, 2 Haw. App. 506, 635 P.2d 244 (1981). Determination of the proper amount of damages, if any, is within the exclusive province of the jury, since they are the sole judges of all disputed questions of fact. ***Dias v. Vanek***, 67 Haw. 114, 117, 679 P.2d 133 (1984)

The instructions to the jury and the special verdict were not ambiguous. The jury heard evidence of the relationship of Allison and Kamisugi to Libbie & Co. The jury was instructed that officers, directors or shareholders of a corporation are personally liable for tortious conduct only if they authorize, order or participate in such conduct (Jury Instruction 21, App. G). The jury was instructed that a principal is not personally liable for punitive damages for the acts of his or her agent unless the principal

authorized, approved, ratified, or participated in the wrongful acts. (Jury Instruction 18, App. G). A corporate agent such as Kamisugi is individually liable for tortious acts performed in the scope of her employment.

> A corporate agent knowingly participating in a tortious or fraudulent act may be held individually liable, even though he performed the act as an agent for the corporation. Knowing participation in a tortious act will render the corporate agent personally liable, which the mere breach of a corporate contractual obligation will not. It is not necessary that the "corporate veil" be pierced in order to impose personal liability, as long as it is shown that the corporate officer knowingly participated in the wrongdoing. ***Barclay v. Johnson***, Tex.App, 1 Dist., 686 S.W.2d 334, 337 (1985).

The Defendants failed to show that the jury was confused or misinstructed. The jury was instructed that "[E]ach party in this case, whether an individual, a corporation, a general partnership, or a limited partnership is entitled to the same fair and unprejudiced treatment." (Jury Instruction 4, App. G).

4. There Is No Controlling Law To Bar The Joint Consideration By A Jury Of The Corporate President's And The Corporation's Vicarious Liability For Intentional Torts And Punitive Damages.

The trial court correctly instructed the jury, under ***Eastern Star***, that the corporation would also be vicariously liable for Kamisugi's acts if there were clear and convincing evidence that she authorized, approved, ratified or participated in the wrongful acts. (See Jury Instruction 18, App. G). A corporation acts only through its agents.

"The president and general manager, or, in his absence, the vice president in his place, actually wielding the whole executive power of the corporation, may well be treated as so far representing the corporation and identified with it that any wanton, malicious, or oppressive intent of his, in doing wrongful acts in behalf of the corporation to the injury of others, may be treated as the intent of the corporation itself." ***Lake Shore & Michigan Southern Railway Company v. Prentice***, 147 U.S. 101, 114, 13 S. Ct. 261, 265, 37 L. Ed. 97 (1893)

Contrary to Kamisugi's assertions, it is not a universal rule that punitive damages may not be jointly assessed against a corporate officer and her corporation. The courts are widely divided as to whether punitive damages should be apportioned among joint tortfeasors. Some states hold that there can be no apportionment among joint tortfeasors for punitive damages. ***Anno. Apportionment of Punitive or Exemplary Damages as Between Joint Tortfeasors***, 20 ALR 3d. 666, at 668.

In the leading case on punitive damages, ***Pacific Mutual Life Insurance Co. v. Haslip***, 111 S. Ct. 1032 (1991), the Court upheld the punitive damage award in Alabama to the insureds whose premiums were never paid to the corporate insurer by the insurer's sales agent. In the state court proceeding, the jury had considered the insurer and its sales agent together in its verdict for damages and a single sum was returned on the jury verdict against both. (In Alabama, punitive damages are **not** apportionable among joint tortfeasors. *See* ***General Motors Corp. v. Edwards***, 482 So. 2d 1176 (Ala, 1985). The Court held that holding the insurer liable for the fraudulent acts of its agent did not violate the Fourteenth Amendment, and that vicarious liability for punitive damages would have a deterrent effect on wrongdoing. The Court also noted that in Alabama punitive damages are not based on ability to pay. 111 S.Ct. at 1042.

None of the cases reported by Kamisugi decided the issue raised when a corporate officer directly participates in fraud, whether the corporation and its corporate officer must be considered separately in the award of punitive damages.

In *Eastern Star*, *supra*, the Intermediate Court of Appeals held that a corporation and its corporate officer would be held jointly and severally liable in treble damages for violation of Haw. Rev. Stat. §480-2. Like Kamisugi, the president of defendant Union Building Materials, attempted to hide behind the corporate shield and disclaim any individual liability for his participation in the wrongful acts. The court said "Where there is participation in the tortious conduct, corporate officers are not shielded by the corporation and will be personally liable," 6 Haw. App. at 135., and that the corporation and its officers could be both liable civilly and criminally.

In ***Silva***, *supra*, the Court held that the sales agent was an agent of the brokerage, and that the brokerage was equally liable with the sales agent for all damages. 2 Haw. App. at 192. Joint punitive damages of $50,000 were sustained. (The issue of whether the brokerage could be held liable for punitive damages separate and apart from the agent was specifically not addressed.)

In ***Sieben v. Sieben***, 231 Kan. 372, 646 P. 2d 1036 (1982), plaintiff alleged a battery by the president of a corporation in a dispute over the corporation's equipment. Plaintiff sued both the president, another employee and, on the basis of respondeat superior, the company. By separate verdicts, the jury apportioned punitive damages and awarded $8,000 against the president and $8,000 against the company. The court held it was error to apportion the damages in an intentional tort action between employer and employee because the employer's liability was derivative of the employee's actions and modified the award so that the total of punitive damages for which the President and the company were jointly liable was $8,000.

In *Gomez v. Nora Security, Inc.*, 462 N.E. 2d 212 (Ind. 2d Dis., 1984), although holding that when the employee's acts are not within the scope of his employment, the employer cannot be liable for punitive damages, the court said on the issue of apportionment of punitive damages:

> [T]he relationship between employer and employee under the doctrine of respondeat superior is not strictly that of joint tort-feasors. Where the master's liability for the act of his servant is based solely upon respondeat superior, and not upon any personal share in the act, a suit may be maintained against both and their liability is regarded as both joint and several even though they are not considered joint tort-feasors. In such instance, it is proper for the court to instruct the jury not to apportion damages but to return a single sum judgment against both defendants. [Citations omitted].

In this case, the jury did individualize liability for punitive damages by awarding differing amounts. Kamisugi has no basis to argue that the jury concluded illogically and in contravention of the court's charge that if Libbie & Co. were liable because of Allison's actions, then without evidence of any wrongful act by her, Kamisugi merely as an officer, shareholder or director of Libbie & Co. was also liable.

5. The Trial Court, In Its Exercise of Discretion Determined That The Jury Understood The Charge And That There Was Substantial Evidence To Support The Jury's Verdict.

In addition to finding the Defendants waived any objection to the special verdict form, the trial court, denied the Defendants' motion for a new trial, and found there was

substantial evidence from which the jury could find the Defendants worked together to defraud the Kuhnerts and to support the jury's award of compensatory and punitive damages to the Kuhnerts. (TR 8/29, p. 65-66).

A jury finding on factual issues supported by substantial evidence may not be set aside on appeal). ***Ashford v. Thomas Cook and Son (Bankers) Limited***, 52 Haw. 113, 471 P.2d 530 (1970) A trial court's complete discretion as to whether a special or general verdict is to be returned, extends to determining the form of the verdict and interrogatories, provided only that the questions asked are adequate to obtain a jury determination of all factual issues essential to the judgment. ***In Re Hawaii Federal Asbestos Cases***, 871 F.2d 891 (9th Cir. 1989)

> "[A] verdict must be molded consistently with a jury's answers to special interrogatories when there is any view of the case which reconciles the various answers. (emphasis in original). It is not appropriate for us [the appellate court] to speculate as to what we would have awarded if we had heard the evidence on damages, or guess what the jury was 'really' trying to do in giving the answers that it did, or even judge what is the most reasonable view of those answers."
> ***McAdam v. Dean Witter Reynolds, Inc.***, 896 F.2d 750 (3rd Cir. 1990)

In ***Atlantic and Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.***, 369 U.S. 355, 264, 82 S.Ct. 780, 7 L.E.Ed.2d 798 (1962), Reh'g denied, 369 U.S. 882, 82 S.Ct. 1137, 8 L.Ed.2d 284 (1962), the U.S. Supreme Court held,

> [W]here there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way. For a search for one

> possible view of the case which will make the jury's findings inconsistent, results in a collision with the Seventh Amendment of the United States Constitution.

Cf., "[R]espect for the jury's assessment of the evidence is constitutionally mandated", by Article I, § 13 of the Hawaii State Constitution. ***Harkins v. Ikeda***, 57 Haw. 378, 381, 551 P.2d 788, 791 (1976).

In ***Dreiling v. General Electric Co.***, *supra*,, the court set forth the following test in determining the adequacy of a special verdict form: (i) whether, when read as a whole and in conjunction with the general charge the interrogatories adequately presented the contested issues to the jury; (ii) whether the submission of the issues to the jury was 'fair'; and (iii) whether the 'ultimate question of fact' were clearly submitted to the jury.

Under ***Dreiling***, the special verdict, when read in conjunction with the instructions presented the issues to the jury on the liability of the Defendants for fraudulent misrepresentation, fraudulent concealment and breach of fiduciary duty. The submission of the issues to the jury was fair because the jury was instructed on the burden of proof required for each charge and was required to find, under the clear and convincing standard, fraudulent misrepresentation and concealment and willful, wanton acts to justify punitive damages. The ultimate questions of fact were unambiguously presented in the special verdict form given to the jury in this case.

D. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN NOT REMITTING COMPLETELY THE JURY'S COMPENSATORY AND PUNITIVE DAMAGE AWARDS AGAINST KAMISUGI.

1. The Trial Court Upheld The Jury's Verdict Which Was Based On Substantial Evidence Of Fraudulent Misrepresentation And Breach of Fiduciary Duty.

The Defendants moved for judgment notwithstanding the verdict, new trial, or in the alternative, for remittitur. (RA VI, 109, 167-218). The trial court denied the Defendants' motion for judgment notwithstanding the verdict and new trial and for total remittitur. (TR 8/29, pp. 62-67, TR 9/7, pp. 58-59). In its denial, the trial court said:

> The Court finds that there is substantial evidence, direct and circumstantial, to support the verdict with respect to liability, compensatory and punitive damages of the defendants. (TR 8/29 p. 66)

The trial court affirmed the jury's evaluation of the evidence and finding, by clear convincing evidence, that compensatory and punitive damages against the Defendants were warranted. An agent is subject to liability for any loss to the principal arising from breach of duty. ***Restatement (Second) Agency*** § 401 (1958). When a real estate agent breaches his fiduciary duty by not disclosing a dual agency and overvaluing property for an exchange, the client is entitled to both a return of commission and the difference between the fair market value of the property and the contract price. ***Meerdicnk v. Krieger***, 15 Wash. App. 540, 550 P. 2d 42 (1976).

2. The Jury Was Properly Instructed That The Purpose Of Punitive Damages Is To Punish And Deter Others From Similar Conduct. The Jury Awarded Punitive Damages In Amounts Commensurate With The Culpability Of The Defendants.

Kamisugi claims that there was no substantial evidence that she acted with the requisite intentional and deliberate wrongdoing to justify punitive damages. The jury could and did conclude that Kamisugi's callous disregard of her clients' welfare and the intentional non-disclosures merited the award of punitive damages under the standard of ***Masaki v. General Motors Corporation***, *supra* at 71 Haw. 16. The deliberate non-disclosures constituted the "affirmative evidence" of fraudulent intent. ***Aloha Petroglyph, Inc. v. Alexander & Baldwin, Inc,*** 1 Haw. App. 353, 354, 619 P.2d 518 (1980)

> Plaintiff must prove by clear and convincing evidence that the defendants acted wantonly, or oppressively, with malice to imply a spirit of mischief or criminal indifference to civil obligations, or that there has been some willful misconduct or such an entire want of care which would raise the presumption of a conscious indifference to the consequences.

The jury exercised its discretion, upon proper instruction by the trial court and assessed punitive damages against each of the Defendants. "[A]n award of punitive damages is purely incidental to the cause of action. They may be awarded by the grace and gratuity of the law. They also act as a means of punishment to the wrongdoer and as an example and deterrent to others." ***Kang v. Harrington***, *supra* at 59 Haw. 660. The jury then awarded punitive damages, "[T]o punish the wrongdoer . . . and to serve as an example or warning to the wrongdoer and others not to engage in such conduct". Jury Instruction Number 43 (App. G).

E. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN AWARDING PREJUDGMENT INTEREST ON THE JUDGMENT IN ACCORDANCE WITH H.R.S. § 636-16.

The Kuhnerts are entitled to prejudgment interest as compensation for the tortious conduct of the Defendants in defrauding the Kuhnerts over the sale of their Pali property. The trial court properly exercised its discretion to designate the date to commence award of prejudgment interest on the damages awarded under H. R. S. § 636-16 which provides:

> In awarding interest in civil cases, the judge is authorized to designate the commencement date to conform with the circumstances of each case, provided that the earliest commencement date in cases arising in tort, **may** be the date when the injury first occurred and in cases arising by breach of contract, it **may** be the date when the breach first occurred.
> [Emphasis added].

In ***Lucas v. Liggett & Myers Tobacco Co.***, 51 Haw. 346, 348, 461 P.2d 140 (1969), the Court held, that, "[I]nterest is compensatory in nature, not punitive, and it is for this reason that interest is properly given to a plaintiff . . . ." In ***Wiegand v. Colbert***, *supra* at 68 Haw. 478 the Court acknowledged that the trial court has the power to fix the commencement date of damages as the date of the tort.

> [T]he award of pre-judgment interest is **solely** within the discretion of the trial court. A trial court abuses its discretion when it clearly exceeds the bounds of reason or disregards the rules or principles of law or practice to the substantial detriment to a party." ***SGM Partners v. The Profit Co.***, 8

Haw. App. 86, 120, 793 P.2d 1189 (1990). [Emphasis added.]

Locricchio v. Legal Services Corp., 833 F.2d 1352 (9th Cir. 1987), affirmed that the trial court is vested with the discretion to designate the date for the commencement of prejudgment interest under H.R.S. § 636-16, and the appellate court would only reverse for a clear abuse of discretion. The appellate court noted that the trial court, in establishing the commencement date for prejudgment interest considered the delay in rendering judgment, but that it was not an abuse of discretion for the trial court to do so.

It is irrelevant that the Kuhnerts made their first offer of settlement to the Defendants on March 23, 1990, especially because Defendants never made any offer. (RA II p. 39) The trial court did not consider the Kuhnerts dilatory and did not "penalize" the Kuhnerts but set the commencement dates for prejudgment interest "consistent with the nature of the jury's findings and the verdict." (TR 9/12, p. 24).

The commission of $78,000.00 was paid by payments of $50,000.00 and $28,000.00, so the trial court set the commencement dates for prejudgment interest as August 1, 1983 and August 1, 1984, respectively. (TR 9/12, p. 25). For the $325,000.00 in compensatory damages, the trial court set the commencement date for prejudgment interest at August 1, 1985, "[T]he date when the apartment [Penthouse] was returned to the plaintiff unsold." The court denied prejudgment interest on the general damage award. (TR 9/12, p. 26).

The trial court did not abuse its discretion in setting the date at which to commence prejudgment interest. To the contrary, the trial court made a careful and deliberate effort to be fair to the Defendants by not setting one date to commence prejudgment interest for all special damages, but

by setting the commencement dates on the dates he considered the damages fixed for the Plaintiffs.

VII. CONCLUSION

For the reasons and authorities above stated, the Court should affirm the trial court's denial of the Defendants' Motions for JNOV/New Trial but restore the judgment to the full amounts awarded by the jury.

Dated: Honolulu, Hawaii. July, _____, 1991.

/S/ CONNIE G.W. MEREDITH

RONALD G.S. AU
GERALD H. KURASHIMA
CONNIE G.W. MEREDITH
ATTORNEYS FOR PLAINTIFFS-APPELLEES
CROSS-APPELLANTS HEINZ KUHNERT AND
SHERILYN MARIE KUHNERT

APPENDICES

Appendix A for
Appendix F

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

HEINZ W. KUHNERT and SHERILYN MARIE KUHNERT,	) CIVIL NO. 88-3197)) SPECIAL VERDICT
Plaintiffs,	)
vs.	)
CLYDE H. ALLISON, LIBBIE & COMPANY, INC., a Hawaii corporation, MARION LIBBIE KAMISUGI, DARLENE M. OSTERMAN, and HERBERT DAVID OSTERMAN	)
Defendants.	)

SPECIAL VERDICT

The jury must answer all of the questions unless otherwise indicated. To understand what issues are being submitted to you, you may wish to read over the entire Special Verdict before proceeding to answer. Answer the questions in numerical order. Follow all directions carefully. Each answer requires the agreement of at least ten (10) jurors; however, the same ten (10) jurors need not agree on each answer. If you do not understand any question or if you wish to communicate with the Court on

any other subject, you must do so in writing through the Bailiff.

CLAIMS OF HEINZ AND SHERILYN KUHNERT

1. Did any of the defendants commit fraudulent misrepresentation or fraudulent concealment?

Yes √ No

If your answer is "yes", please put a check mark by such defendant or defendants, and then go to Question No. 2. If your answer is "no", go to Question No. 3.

Clyde H. Allison and Libbie & Company, Inc. √

Libbie Kamisugi and Libbie & Company, Inc. √

Darlene M. Osterman √

David Osterman √

2. Was the fraudulent misrepresentation and/or concealment by a defendant a legal cause of actual damage to the plaintiffs?

Yes √ No

If your answer is "yes", please put a check mark by such defendant or defendants.

Clyde H. Allison and Libbie & Company, Inc. √

Libbie Kamisugi and Libbie & Company, Inc. √

Darlene M. Osterman √

David Osterman √

3. Did defendant Clyde H. Allison and Libbie & Company, Inc., and/or Libbie Kamisugi and Libbie & Company, Inc. breach a fiduciary duty to the plaintiffs?

Yes √ No

If your answer is "yes", please put a check mark beside the name of such defendant or defendants and go to Question No 4. If your answer is "no", go to Question No 5.

Clyde H. Allison and Libbie & Company, Inc. √

Libbie Kamisugi and Libbie & Company, Inc. √

4. Was the breach of a defendant's fiduciary duty a legal cause of actual damage to the plaintiffs?

Yes √ No

If your answer is "yes", please put a check mark by such defendant or defendants.

Clyde H. Allison and Libbie & Company, Inc. √

Libbie Kamisugi and Libbie & Company, Inc. √

5. If your answer to Question 2 and/or 4 was "yes" state the amount of actual damages suffered by the plaintiffs in the spaces set forth below. If your answer to Questions No. 2 and 4 are "no", then go to Question No. 1 under "CLAIMS OF DEFENDANTS DARLENE AND DAVID OSTERMAN.

Heinz and Sherilyn Kuhnert:

Special Damages $498,625.00

Heinz Kuhnert:

General Damages $20,000.00

Sherilyn Kuhnert:

General Damages $10,000.00

6. Should any defendant be assessed with punitive damages?

Yes √ No

If so, place the amount of such assessment by such defendant or defendants:

Clyde H. Allison and Libbie & Company, Inc.	$500,000.00
Libbie Kamisugi and Libbie & Company, Inc.	$1,465,000.00
Darlene M. Osterman	$250,000.00
David Osterman	$250,000.00

CLAIMS OF DEFENDANTS DARLENE AND DAVID OSTERMAN

1. Did plaintiffs or either of them commit fraudulent misrepresentation?

Yes No √

If your answer is "yes", then go to the next question.

If your answer is "no", then sign and date the verdict form and call the bailiff.

2. Was such fraudulent misrepresentation a legal cause of damage to defendants Darlene and David Osterman?

Yes No

If your answer is "yes", then go to Question No. 3.

If your answer is "no", then sign and date the verdict form and call the bailiff.

3. If your answer to Question No. 2 was "yes", then state actual damages sustained by the defendants as follows:

Darlene and David Osterman:

Special Damages $_____

4. Should plaintiff Heinz Kuhnert be assessed with punitive damages?

Yes No

If your answer is "yes", state the amount thereof:

Darlene and David Osterman:

Punitive Damages _____

Dated at Honolulu, Hawaii, June 19, 1990. 10:22 a.m.

/s/_____

Foreperson

RONALD G.S. AU 599-0
GERALD H. KURASHIMA 5071-0
1120 Pacific Tower
1001 Bishop Street
Honolulu, Hawaii 96813
Tele,: 533-7431

Attorneys for Plaintiffs

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

HEINZ W. KUHNERT and SHERILYN MARIE KUHNERT,	) CIVIL NO. 88-3197-10
Plaintiffs,	) (CONTRACT)
vs.	) JUDGMENT
CLYDE H. ALLISON, LIBBIE & COMPANY, INC., a Hawaii corporation, MARION LIBBIE KAMISUGI, DARLENE M. OSTERMAN, HERBERT DAVID OSTERMAN, JOHN DOE 1-5, DOE CORPORATION 1-5, DOE PARTNERSHIP 1-5, and DOE GOVERNMENTAL ENTITITY 1-5,	) TRIAL: Commenced May 10, 1990) JUDGE: Hon. Leland H. Spencer
Defendants.	)

Appendix B for
Appendix F

JUDGMENT

Pursuant to the Special Verdict returned by the jury on June 19, 1990, after trial which commenced on May 10, 1990, with Ronald G. S. Au and Gerald H. Kurashima appearing for Plaintiffs Heinz W. Kuhnert and Sherilyn Marie Kuhnert; and Paul A. Lynch and Carolyn P. Egli and appearing for Defendants Clyde H. Allison, Libbie & Company, Inc., Marion Libbie Kamisugi, Darlene H. Osterman and Herbert David Osterman, this Court enters Judgment on the Complaint as follows:

SPECIAL DAMAGES

1. Against Defendants Clyde H. Allison, Libbie & Company, Inc., a Hawaii Corporation, Marion Libbie Kamisugi, Darlene M. Osterman, and Herbert David Osterman, jointly and severally, Special Damages to Plaintiffs Heinz W. Kuhnert and Sherilyn Marie Kuhnert in the sum of Four Hundred Ninety-Eight Thousand Six Hundred Twenty-Five and no/100ths Dollars ($498,225.00);

GENERAL DAMAGES

1. Against Defendants Clyde H. Allison, Libbie 6 Company, Inc., a Hawaii Corporation, Marion Libbie Kamisugi, Darlene M. Osterman, and Herbert David Osterman, jointly and severally, General Damages to Plaintiff Heinz W. Kuhnert in the sum of Twenty Thousand and no/100ths Dollars ($20,000.00);

2. Against Defendants Clyde H. Allison, Libbie & Company, Inc., a Hawaii Corporation, Marion Libbie Kamisugi, Darlene M. Osterman, and Herbert David Osterman, jointly and severally, General Damages to Plaintiff Sherilyn Marie Kuhnert in the sum of Ten Thousand and no/100ths Dollars ($10,000.00).

PUNITIVE DAMAGES

1. Against Defendant Clyde H. Allison, Punitive Damages to Plaintiffs Heinz W. Kuhnert and Sherilyn Marie Kuhnert in the

sum of Five Hundred Thousand and no/100ths Dollars ($500,000.00).

2. Against Defendant Marion Libbie Kamisugi and/or Defendant Libbie & Company, Inc., Punitive Damages to Plaintiffs Heinz W. Kuhnert and Sherilyn Marie Kuhnert in the sum of One Million Four Hundred Sixty-Five Thousand and no/100ths Dollars ($1,465,000.00)

3. Against Defendant Darlene M, Osterman, Punitive Damages to Plaintiffs Heinz W. Kuhnert and Sherilyn Marie Kuhnert in the sum of Two Hundred Fifty Thousand and no/100ths Dollars ($250,000,00).

4. Against Defendant Herbert David Osterman, Punitive Damages to Plaintiffs Heinz W. Kuhnert and Sherilyn Marie Kuhnert in the sum of Two Hundred Fifty Thousand and no/100ths Dollars ($250,000,00).

Pursuant to the Special Verdict returned by the jury, the Court also enters judgment in favor of the Plaintiffs on

Defendant Herbert David Osterman and Darlene M. Osterman's Counterclaim. There were no other named Defendants.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Plaintiffs shall have judgment on the Complaint in the amount of damages as stated herein and their reasonable costs.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that the Plaintiffs shall have judgment on the Counterclaim and their reasonable costs.

Dated: Honolulu, Hawaii, August 7, 1990.

/s/LELAND H. SPENCER
JUDGE OF THE ABOVE-
ENTITLED COURT

APPROVED AS TO FORM:
/s/ CAROLINE P. EGLI
PAUL A. LYNCH
CAROLYN P. EGLI
Attorneys for Defendants
Clyde H. Allison, Libbie &
Company, Inc., Darlene M. Osterman
and Herbert David Osterman

/s/JERROLD Y. CHUN
WILLIAM C. MCCORRISTON
JERROLD Y. CHUN
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Marion Libbie Kamisugi

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Attorneys for Plaintiffs

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

HEINZ W. KUHNERT and SHERILYN MARIE KUHNERT,	) CIVIL NO. 88-3197-10
Plaintiffs,	) (CONTRACT)) FIRST AMENDED) JUDGMENT
vs.	)
CLYDE H. ALLISON, LIBBIE & COMPANY, INC., a Hawaii corporation, MARION LIBBIE KAMISUGI, DARLENE M. OSTERMAN, HERBERT DAVID OSTERMAN, JOHN DOE 1-5, DOE CORPORATION 1-5, DOE PARTNERSHIP 1-5, and DOE GOVERNMENTAL ENTITITY 1-5,	) TRIAL: Commenced May 10, 1990) JUDGE: Hon. Leland L. Spencer
Defendants.	)

FIRST AMENDED JUDGMENT

Pursuant to the Special Verdict returned by the jury on June 19, 1990, after trial and hearing on August 27, 28, 29, 1990 and September 7, 12, 1990, with Ronald G. S. Au and Gerald H. Kurashima appearing for Plaintiffs Heinz W. Kuhnert and Sherilyn Marie Kuhnert, Paul A. Lynch appearing for Defendants Clyde H. Allison, Libbie & Company, Inc., Darlene H. Osterman and Herbert David Osterman, and William C. McCorriston and Jerrold Y. Chun appearing for Defendant Marion Libbie Kamisugi, this Court enters a First Amended Judgment for the Plaintiffs Heinz W. Kuhnert and Sherilyn Marie Kuhnert as follows:

SPECIAL DAMAGES

1. Against Defendants Clyde H. Allison, Libbie & Company, Inc., a Hawaii Corporation, Marion Libbie Kamisugi, Darlene M. Osterman, and Herbert David Osterman, jointly and severally, Special Damages to Plaintiffs Heinz W. Kuhnert and Sherilyn Marie Kuhnert in the sum of Three Hundred

Twenty-Five Thousand and no/100 Dollars ($325,000 00),

2. Against Defendants Clyde H. Allison, Marion Libbie Kamisugi and Libbie & Company, Inc., a Hawaii Corporation, jointly and severally, Special Damages to the Plaintiffs Heinz W. Kuhnert and Sherilyn Marie Kuhnert in the sum of Seventy-Eight Thousand and no/100ths Dollars ($78,000.00).

GENERAL DAMAGES

1. Against Defendants Clyde H. Allison, Libbie 6 Company, Inc., a Hawaii Corporation, Marion Libbie Kamisugi, Darlene M. Osterman, and Herbert David Osterman, jointly and severally, General Damages to Plaintiff Heinz W. Kuhnert in the sum of Twenty Thousand and no/100ths Dollars ($20,000.00);

2. Against Defendants Clyde H. Allison, Libbie 6 Company, Inc., a Hawaii Corporation ,

Marion Libbie Kamisugi, Darlene M. Osterman, and Herbert David Osterman, jointly and severally, General Damages to Plaintiff Sherilyn Marie Kuhnert in the sum of Ten Thousand and no/100ths Dollars ($10,000.00).

PUNITIVE DAMAGES

1. Against Defendant Clyde H. Allison, Punitive Damages to Plaintiffs Heinz W. Kuhnert and Sherilyn Marie Kuhnert in the sum of Two Hundred Thousand and no/100ths Dollars ($200,000.00).

2. Against Defendant Marion Libbie Kamisugi and/or Defendant Libbie & Company, Inc., Punitive Damages to Plaintiffs Heinz W. Kuhnert and Sherilyn Marie Kuhnert in the sum of Two Hundred Ninety-Three Thousand and no/100ths Dollars ($293.000.00). The cumulative amount of punitive damages owed by Defendant Marion Libbie Kamisugi and Libbie & Company,

Inc,, is $293,000,00. Payment by either Defendant shall reduce the principal sum owed.

3. Against Defendant Darlene M, Osterman, Punitive Damages to Plaintiffs Heinz W. Kuhnert and Sherilyn Marie Kuhnert in the sum of One Hundred Twenty-Five Thousand and no/100ths Dollars ($125,000,00).

PREJUDGMENT INTEREST

1. Against Defendants Clyde H, Allison, Libbie & Company, Inc., Darlene M. Osterman, Herbert David Osterman and Marion Libbie Kamisugi, jointly and severally, prejudgment interest at the statutory rate of ten percent (10%) per year on Special Damages of Three Hundred Twenty-Five Thousand and no/100ths Dollars ($325,000.00), commencing from the date August 1, 1985, and continuing until entry of the First Amended Judgment.

2. Against Defendants Clyde H. Allison, Libbie & Company, Inc., and Marion Libbie Kamisugi, jointly and severally, prejudgment interest at the statutory rate of ten percent (10%) per year on the Special Damages of Seventy-eight Thousand and no/100ths Dollars ($78,000.00); as follows: Prejudgment interest on Fifty Thousand and no/100ths Dollars ($50,000.00) commencing from August 1, 1983 and continuing until entry of the First Amended Judgment; and on Twenty-Eight Thousand and no/100ths Dollars ($28,000.00) commencing from August 1, 1984, and continuing until entry of the First Amended Judgment.

Pursuant to the Special Verdict returned by the jury, the Court also enters judgment in favor of the Plaintiffs on Defendant Herbert David Osterman and Darlene M. Osterman's Counterclaim. There were no other named Defendants.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Plaintiffs shall have judgment on the Complaint in the amount of damages as stated herein, post judgment interest and their reasonable costs.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that the Plaintiffs shall have judgment on the Counterclaim and their

reasonable costs.

Dated: Honolulu, Hawaii, October 16, 1990.

/s/LELAND H. SPENCER
JUDGE OF THE ABOVE-
ENTITLED COURT

APPROVED AS TO FORM:

/s/ CAROLINE P. EGLI
PAUL A. LYNCH
CAROLYN P. EGLI
Attorneys for Defendants
Clyde H. Allison, Libbie &
Company, Inc., Darlene M. Osterman
and Herbert David Osterman

/s/JERROLD Y. CHUN
WILLIAM C. MCCORRISTON
JERROLD Y. CHUN
Attorneys for Defendant
Marion Libbie Kamisugi

HAWAII ASSOCIATION OF REALTORS® STANDARD FORM

DEPOSIT RECEIPT, OFFER AND ACCEPTANCE

(Standard Provisions on the reverse side are part of this DROA)

REALTOR®

Reference Date _____

DEPOSIT RECEIPT

Received from H. David & Darlene M. Osterman herein called Buyer the sum of $ 5000.00 in the form of _____ as an initial deposit on account of this offer. Receipt is acknowledged by Clyde H. Allison

Libbe & Company, REALTOR'S firm and address 1660 Kuhio St - Suite 201 Honolulu, Hi 96814 PHONES (Home) 521-3727 (Bus) 528-1341

Buyer agrees to make an additional deposit of $ 5000.00 in cash on or before July 10, 1983

OFFER

1. PURCHASE PRICE: $ One Million - Three Hundred Thousand Dollars ($1,300,000.00)
2. PROPERTY DESCRIPTION: Tax Map Key Division 1 / Zone 1 / Sec 9 / Plat 009 / Parcel 032 - 035

(a) Realty. All of that (leasehold) (fee simple) property situated at 3762 Old Pali Road Honolulu, Hawaii described as follows All Fee Simple Land including Main House 5 Bedrooms and 2 Bdrm guest Cottage & Pool

(b) Sale includes: All built-in furniture, attached fixtures, built-in appliances, water heater, electrical and/or gas and plumbing fixtures, attached carpeting, existing drapes, and the following items if checked: (X) Chandelier (X) Range (X) Refrigerator (X) Disposal (X) Washer (X) Dryer ( ) Air Conditioning ( ) TV Antenna (X) TV Cable (X) Dishwasher ( ) Compactor, and _____ (furnishings & pool equipment per attached inventory if any). Specifically excluded: _____

(c) Title. Seller agrees to convey the property with warranties vesting marketable title in the Buyer, free and clear of all liens and encumbrances except: NONE and any covenants, easements, reservations, restrictions now of record which do not materially affect the value of the property.

(d) Assessments: If Any shall be (paid by Seller at closing) (Assumed by Buyer).

3. FINANCING. Buyer agrees to pay said purchase price as follows:
   $ 100,000.00 in cash, including all deposits herein.
   $ Balance by way of Two Year Agreement of Sale @ 11% Interest only per annum. Interest to be paid at the End of Each year from date of Closing of Escrow.
   $ 1,300,000.00 Total Purchase Price (see paragraph #1 above)
4. CLOSING. Closing will be on or before July 29, 1983, Escrowed at Lang & Malone Escrow Co.
5. OCCUPANCY. Seller agrees to give Buyer occupancy at closing or on July 29, 1983, 19__
6. PRORATIONS. Property taxes, lease rents, interest on assumed obligations, mortgage insurance premiums, other insurance premiums, maintenance fees, tenants rents, if applicable, and _____ shall be prorated as of date of closing or on July 29, 1983. Tenant's security deposit, if any, shall be charged to Seller and credited to Buyer at closing.
7. TENANCY. Title shall vest in the Buyer(s) as follows: H. David & Darlene M. Osterman (give full legal name(s) and marital status) Tenancy Entirety
8. SPECIAL PROVISIONS (Please number):
   (1) No Prepayment Schedule if Buyer pays off Agreement of Sale (2 years) prior to July 29, 1985
   (2) Seller will if needed finance 2 year @ 11% if Requested by Buyer
   (3) All Electrical & Plumbing to be in working Condition
   (4) Seller will Leave property Insured @ 1119 Punahou Penthouse #2 at $95,000.00
   (5) Seller will pay Commissions Due Libbe & Company 7 Ford.
   9 Payment of Equity in the Pali Property at Close of Escrow Balance of 25,000.00 to be paid by H. Kuhnert
   10 Buyer to pay Lang & Malone time and Money Recorded Transfer Fee & G.E.
9. AGREEMENT TO BUY. The buyer agrees to buy the property on the terms and conditions stated herein. Buyer acknowledges receipt of a copy hereof, and agrees that this offer shall be binding if accepted by the Seller before 3 PM/PM June 23, 1983 Offer Date June 23, 1983 1 AM/PM

Buyer's address 1114 Punahou St. Penthouse #2

Phones (Home) 941-3535 (Bus) 945-5566

X Buyer H. David & Darlene M. Osterman

X Buyer H. David Osterman

Give Next Sale within 2 years of Agreement of Sale

ACCEPTANCE

10. AGREEMENT TO SELL AND TO PAY BROKERAGE FEE: The Seller agrees to sell the property on the terms and conditions contained herein including The Standard Provisions On The Reverse Side, and acknowledges receipt of a copy hereof. Seller agrees to pay to Libbe & Co, REALTOR, on or before closing 6% or one-half of the deposits in escrow up to the agreed remedy (B) in Paragraph H of The Standard Provisions On The Reverse Side.

Ex. B

Plan. 011A9 - 465141927

Date June

Seller's Name Heinz W. Kuhnert (give full legal name) Signature _____

Seller's Name Sheelyn M. Kuhnert (give full legal name) Signature _____

Seller's Address 6 Puipala Phones (Home) 395-6150 (Bus) _____

11. ACKNOWLEDGEMENT OF ACCEPTANCE. Notice of the acceptance of the offer is hereby acknowledged.

Signature Clyde H. Allison Date June 29, 1983 2 AM/PM

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BEST AVAILABLE COPY

Appendix D for Appendix F

A. CONTRACT:
This is more than a receipt for money. It is a legally binding contract. Read it carefully.

B. EVIDENCE OF TITLE:
Seller shall furnish Buyer evidence of title from a licensed abstractor showing Seller's marketable title to the interest which is to be conveyed to Buyer. If Seller fails to do so, Buyer may terminate this agreement and any deposits shall be returned to Buyer. The foregoing shall not exclude any other remedies available to Buyer.

C. SURVEY:
Seller shall order and pay for the cost of staking by a licensed surveyor. If boundary disputes are not involved, Buyer may choose to contest the accuracy of staking. He may order a survey prior to closing and if [illegible] Seller to the cost of the survey, on or before closing only if the original stakes prove to be inaccurate. This provision does not apply to a condominium or co-operative apartment.

D. CUSTOMARY CLOSING COSTS (Except Where Not Applicable):
These are customary costs and not intended to be an all inclusive list.

Expenses to be paid by Buyer	Expenses to be paid by Seller
Continuation of Title Evidence	Evidence Showing Good Title
Title Insurance (Less Seller's Cost of Certificate of Title)	Drafting of Deed or Assignment of Lease
Drafting of Agreement of Sale	VA or FHA Discount Points
Drafting of Mortgage and Note	Drafting of Seller's Consents
Drafting of Buyer's Consents	Drafting of Bill of Sale
Mortgage Assumption Fee	Seller's Notary Fee
Buyer's Notary Fee	Seller's Consent Fee
Buyer's Consent Fee	Conveyance Tax
All Recording Fees except Documents to Clear Seller's Title	½ Escrow Fee
½ Escrow Fee	Survey and Staking
Condo Ownership Transfer Fee	Termite Clearance Letter

E. TERMITE INSPECTION:
Seller shall deliver to Buyer through escrow a letter from a licensed pest control company stating that there is no live visible termite infestation in the improvements described herein. Seller shall pay for termite extermination treatment if it is required in order to furnish the letter.

F. SELLER'S LIMITED WARRANTY:
The Seller warrants and the Buyer will acknowledge in writing that all major appliances, plumbing and electrical and/or gas fixtures included in the sale will be in working order consistent with their age as of the date of closing or occupancy, if earlier. No continuing warranty is expressed or implied.

G. RISK OF LOSS AND INSURANCE:
Risk of loss and responsibility for insurance coverage passes to Buyer upon transfer of title or occupancy whichever comes first.

H. DEFAULT:
It is expressly understood and agreed: First: In the event Buyer fails to pay the balance of the purchase price or complete the purchase as herein provided, Seller may (a) bring an action for damages for breach of contract, or (b) retain the initial deposit and all additional deposits provided for herein as liquidated damages. Second: In the event Seller fails to perform his obligations as herein provided, Buyer, not being in default, Buyer may (a) bring an action against Seller for damages for breach of contract, or (b) file and maintain an action against Seller for specific performance of this contract. The foregoing shall not exclude any other remedies available to either Seller or Buyer. In the event of a law suit arising out of this contract, including a suit by a REALTOR for commission, the prevailing party shall be entitled to recover all costs incurred including reasonable attorney's fees.

I. CLOSING:
For the purposes of this contract, "closing" shall be the date upon which all appropriate documents are recorded. Buyer and Seller agree to execute appropriate or customary documents when requested to do so.

J. CONSENT:
The obligations of Buyer or Seller hereunder are conditioned upon obtaining those necessary consents of vendors, lessors and/or condominium, cooperative or other such associations. Buyer or Seller agree to cooperate and take all reasonable action to obtain such consents.

K. TIME IS OF THE ESSENCE:
If either Buyer or Seller for reasons beyond his control, cannot perform his obligation to purchase or sell the property by the closing date, then such party by giving written notice can extend closing for no longer than 30 calendar days to allow performance. Thereafter time is of the essence and the default provisions of Paragraph H apply. Any further extension must then be agreed to in writing by both parties. There is no automatic right to extend. This provision relates only to the extension of the closing date.

L. OBLIGATIONS:
REALTOR® shall not be held liable to either Buyer or Seller for the failure of either to perform their obligations pursuant to this contract.

M. CONFLICT:
Handwritten or typed provisions herein shall supersede any printed provisions in this contract if there is a conflict.

N. PERMISSION:
The REALTOR has the Buyer's and Seller's permission to supply data to Multiple Listing Service regarding the sale's price and terms of this transaction, for use by REALTORS in making market studies, providing service to the public and advising their clients.

O. COMPLETE AGREEMENT:
This contract constitutes the entire agreement between the parties and supersedes and cancels any and all prior allegations, representations, warranties, understandings or agreements (both written and oral) of the parties. No variation or amendment of this contract shall be valid or enforceable without written approval by the parties.

IMPORTANT: PLEASE SEPARATE DUPLICATE COPIES BEFORE EXECUTING COOPERATING REALTOR'S SEPARATE AGREEMENT OR SIGNATURES WILL COPY THROUGH TO OTHER SIDE.

COOPERATING REALTOR'S SEPARATE AGREEMENT

Seller's REALTOR agrees to pay to Cooperating REALTOR (through escrow) the following amount [illegible] in consideration for assistance given by Cooperating REALTOR, provided there is no obligation to pay any amount to the Cooperating REALTOR in the event Seller retains Buyer's deposit money as liquidated damages.

Date _____, 19____	Date _____, 19____
Seller's REALTOR _____ (name of REALTOR firm)	Cooperating REALTOR _____ (name of REALTOR firm)
By _____	By _____
Address _____	Address _____
Phones _____	Phones _____

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EXCLUSIVE RIGHT-TO-SELL
RESIDENTIAL LISTING FORM

BINDING CONTRACT — — PLEASE READ CAREFULLY BEFORE SIGNING

3368 Old Pali Road (Nuuanu)

Honolulu

Nuuanu
Kaimuki

Remodeled/Beautiful-Kaimuki Estate. Restored to retain beautiful original charm. Vaulted ceilings, Plantation fans, Wiltan, Jacuzzi, Wine vault, Beautifully Landscaped/Fith pool and guest-house. Room for tennis court, or build another Estate on approx. 11,666 Sq. Ft. Contact Listee for tour.

Office: Liddle & Correan — Phone: 533-1551 — Salesperson: Clyde W. Allison

to Liddle & Correan REALTOR® Aug. 88 at 5:

Being REALTOR®

In consideration of REALTOR® listing the property described above, Seller hereby gives to and confers upon REALTOR® the exclusive and irrevocable right to sell the property during the listing period set forth herein (the "Listing Period"). Seller agrees that during the Listing Period Seller will refer to REALTOR® all inquiries received by Seller or any other person in any manner indicating a desire to purchase the property and that Seller will not negotiate directly with any prospective purchaser who has not been introduced to Seller by REALTOR®. Seller understands that REALTOR® cannot assure that the property will be sold during the Listing Period or any other time and that REALTOR® makes no representations or warranties concerning the property or REALTOR®'s ability to sell the property.

In consideration of the foregoing, Seller hereby agrees as follows:

1. To deliver the property to REALTOR® for the purposes and terms described above;
2. To promptly and definitely refer to REALTOR® all inquiries received by Seller or any other person in any manner indicating a desire to purchase the property, and to refer all such inquiries directly to REALTOR®;
3. To cause Seller's attorney to notify REALTOR® of any offer to purchase the property received by Seller's attorney;
4. To authorize and permit REALTOR® to place upon the property a "For Sale" sign and a lockbox containing keys to the property.

Seller's property may be shown to prospective purchasers at times convenient to Seller and REALTOR®, and Seller agrees to cooperate with REALTOR® in connection with the showing of the property. REALTOR® is authorized to accompany all prospective purchasers when showing the property and to have other persons present at any time during showings. Seller agrees that REALTOR® does not have the authority to bind Seller to any sale or lease of the property, and that no sale or lease of the property shall be valid unless and until Seller executes a written agreement to sell or lease the property.

REALTOR® is hereby authorized to cooperate with other brokers and to offer compensation to other brokers from the proceeds of sale. Seller understands that REALTOR® does not represent the interests of any prospective purchaser, and that REALTOR® will not disclose to any prospective purchaser any information received from Seller which is confidential in nature, unless REALTOR® is required to do so by law. Seller understands that REALTOR® may represent more than one seller and may represent buyers of property listed with REALTOR®. Seller consents to REALTOR® acting as a dual agent in connection with any sale or lease of the property in which REALTOR® represents both Seller and buyer.

Seller agrees to pay REALTOR® a commission of _____% of the sale price of the real and personal property (or if the transaction is a purchase or exchange of control by one of the principals, the listing price of the property).

This listing may be extended by _____ days' advance written notice to REALTOR® but not prior to midnight on _____, 19__.

This listing may be terminated at any time by midnight on _____, 19__.

If required by MULTIPLE LISTING SERVICE (MLS) this listing will be submitted to MLS. REALTOR® is authorized to publish the terms of this listing and the sale price and terms of any sale through the MLS and to allow other REALTORS® access to this information.

REALTOR® has Seller's permission to obtain data to MLS regarding the work, price and terms of any sale of the property and to allow other REALTORS® to obtain this information.

Seller hereby acknowledges receipt of a fully executed copy of this contract.

SELLER _____ SELLER _____

SIGNED _____ SIGNED _____

(SECURITY ID. FACT FOR TAXES PURPOSES)

Seller's address _____

Business phone _____ Residence phone _____

Accepted _____ REALTOR® By _____ Date _____

REALTOR®'s firm address _____

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EXCLUSIVE RIGHT TO SELL CONTRACT

APPENDIX E

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CHAPTER 99

RULES

of the

REAL ESTATE COMMISSION

State of Hawaii

Civil No. 88-3197
PLAINTIFFS
DEFENDANTS
EXHIBIT 53(a)
IN EVIDENCE - ~~FOR IDENTIFICATION~~
REC'D MAY 23 1990 19
CLERK

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§16-99-3 Conduct. (a) To fully protect the general public in its real estate transactions, every licensee shall conduct business in accordance with this section.

(c) The licensee shall protect the public against fraud, misrepresentation, or unethical practices in the real estate field. The licensee shall endeavor to eliminate any practices in the community which could be damaging to the public or to the dignity and integrity of the real estate profession. The licensee shall assist the commission in its efforts to regulate the practice of brokers and salesmen in this State.

(g) The licensee, for the protection of all parties with whom the licensee deals, shall see that financial obligations and commitments regarding real estate transactions are in writing, expressing the exact agreements of the parties, and that copies of those agreements, at the time they are executed, are placed in the hands of all parties involved.

(h) The licensee shall not acquire an interest in or buy for one's self, any member of the licensee's immediate family or firm, or any entity in which the licensee has any ownership interest, property listed with the licensee or the licensee's firm, without making the true position known in writing to the listing owner. When offering for sale, lease, or rental, property which the licensee owns or has an interest in, the licensee shall fully inform the employing broker of the licensee's intention to sell, lease, or rent, and of the licensee's interest in the property. The licensee shall reveal the interest to the purchaser, lessee, or tenant in writing prior to accepting any offer.

§16-99-1 Objective. This chapter, adopted by the real estate commission, hereafter referred to as "commission" is intended to clarify and implement chapter 467, Hawaii Revised Statutes, as amended, to the end that the provisions thereunder, for the protection of the general public in its real estate transactions, may be best effectuated and the public interest most effectively served. [Eff. 12/26/74; am and ren §16-00-1, 4/27/81; am and comp 6/28/82; comp 3/3/84] (Auth: HRS §467-4) (Imp: HRS §467-4)

(n) There shall be a principal broker or a broker in charge at the principal place of business and a broker at a branch office who shall be immediately responsible for the real estate operations conducted at that place of business.

(e) The licensee shall recommend that title be examined, survey be conducted, or legal counsel be obtained when the interest of either party requires it.

Each party to this case, whether an individual, a corporation, a general partnership, or a limited partnership is entitled to the same fair and unprejudiced treatment.

In these instructions whenever I say that a party must prove a claim or a fact, such proof must be made by a preponderance of the evidence in connection with the claim of breach of fiduciary duty and actual damage, and by clear and convincing evidence in connection with the claims of fraudulent misrepresentation, fraudulent concealment and punitive damages.

To "prove by a preponderance of the evidence" means to prove that something is more likely so than not so. It means to prove by evidence which in your opinion convinces you that something is more probably true than not true. To "prove by a preponderance of the evidence" does not mean that a greater number of witnesses or a greater number of exhibits must be produced. As I previously said, you must consider all of the evidence no matter by whom produced; and if you find that on the basis of such evidence, a particular claim or fact is more likely true than not true, then such fact or claim has been proven by a preponderance of the evidence.

"Clear and convincing" evidence means evidence of such convincing force that it demonstrates, in contrast to the opposing evidence, a high probability of the truth of the facts for which it is offered as proof. It is a higher standard than proof by a preponderance of the evidence.

A principal is not liable for punitive damages, if any, as a result of the wrongful acts or omissions of an agent done within the scope of the agent's authority to act for or on behalf of the principal unless there is clear and convincing evidence that the principal authorized, approved, ratified, or participated in such wrongful acts or omissions.

Officers, directors or shareholders of a corporation are not personally liable for the wrongful or tortious conduct of the corporation or its other officers, directors or agents unless such officer, directors or shareholders authorized, ordered or in some manner participated in such wrongful conduct.

PLAINTIFF'S JURY INSTRUCTION NO. 155

If several persons combine and conspire to effect a common object, and it is arranged that each shall do certain acts and perform certain parts, with a view to the attainment of the same common result, and an overt act is committed in furtherance of the common object, all will be responsible for the acts of each of them.

37 Am Jur. 2d. Fraud and Deceit §305

The plaintiffs claim that the defendant committed fraud by intentional misrepresentations. To recover damages for fraud by intentional misrepresentations, plaintiffs must prove each of the following:

1. The defendant made a representation as to a past or existing material fact;

2. The representation was false;

3. The defendant knew that the representation was false when he made it;

4. The defendant made the representation with an intent to defraud the plaintiff, that is, he made the representation for the purpose of inducing the plaintiff to rely upon it and to act or to refrain from acting in reliance thereon;

5. The plaintiff was unaware of the falsity of the representation, acted in reliance upon the truth of the representation, and was justified in relying upon the representation;

6 And, finally as a result of his reliance upon the truth of the representation, the plaintiff sustained damages.

In addition to actual damages, the law permits the jury, under certain circumstances, to award a party punitive and exemplary damages, in order to punish the wrongdoer for some aggravated form of misconduct and to serve as an example or warning to the wrongdoer and others not to engage in such conduct.

Punitive damages may be awarded in cases where a party has acted wantonly or oppressively or with such malice as implied a spirit of mischief or criminal indifference to civil obligations; or where there has been some willful misconduct or that entire want of care which would raise the presumption of a conscious indifference to consequences.

If you decide that a basis for punitive damages has been proven by clear and convincing evidence, the law provides no fixed standards as to the amount of such punitive damages, but leaves the amount to the jury's sound discretion, to be exercised without sympathy or bias or prejudice with respect to any party to the case.

In determining the amount of punitive damages to be awarded, you should consider the degree of malice, wantonness, oppression or want of care exhibited by the party's conduct and you should consider the amount of money required to punish the party and deter the party from such conduct in the future considering the party's financial condition.

§467-14 Revocation and suspension of licenses. The real estate commission may revoke any license issued hereunder, or suspend the right of the licensee to use the license, for any of the following causes:

(1) [Deleted. L 1974, c 205, §2(29)]

(2) Making any misrepresentation concerning any real estate transaction;

(3) Making any false promises concerning any real estate transaction of a character likely to mislead another;

(4) Pursuing a continued and flagrant course of misrepresentation, or making of false promises through advertising or otherwise;

(5) Without first having obtained the written consent so to do of both parties involved in any real estate transaction, acting for both the parties in connection with the transaction, or collecting or attempting to collect commissions or other compensation for his services from both of such parties;

(6) When licensee, being a real estate salesman, accepts any commission or other compensation for the performance of any of the acts hereinabove enumerated in the definition of real estate salesman from any person, copartnership, or corporation other than his employer or, being a real estate broker or salesman, employs or compensates one not licensed under this chapter to perform any such act;

(7) When the licensee, being a real estate salesman, acts or attempts to act as a real estate broker or represents, or attempts to represent, a real estate broker other than his employer;

(8) Failing, within a reasonable time, to account for any moneys belonging to others which may be in the possession or under the control of the licensee;

(9) Any other conduct constituting fraudulent or dishonest dealings;

(10) When the licensee, being a copartnership, permits any member of the copartnership who does not hold a real estate broker's license to actively participate in the real estate brokerage business thereof or permits any employee thereof who does not hold a real estate salesman's license to act as a real estate salesman therefor;

(11) When the licensee, being a corporation, permits any officer or employee of the corporation who does not hold a real estate broker's license to have the direct management of the real estate brokerage business thereof or permits any officer or employee thereof who does not hold a real estate salesman's license to act as a real estate salesman therefor;

(12) When the licensee, being a real estate salesman, fails to file with the commission a written statement setting forth the name of the real estate broker by whom he is employed;

(13) Violating this chapter or the rules and regulations promulgated pursuant thereto;

(14) Splitting fees with or otherwise compensating others not licensed hereunder for referring business; provided, that a licensed broker may pay a commission to a licensed broker of another state if such broker does not conduct in this State any of the negotiations for which a commission is paid;

(15) Commingling the money or other property of his principal with his own;

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(16) Adjudicated insane or incompetent.

No license shall be suspended for longer than two years and no person whose license has been revoked shall be eligible to apply for a new license until the expiration of two years. [L 1933, c 140, §11; RL 1935, §7320; am L 1935, c 126, §§1, 5; RL 1945, §7741; am L 1951, c 77, §5; RL 1955, §170-12; am L 1963, c 9, §1; HRS §467-14; am L 1974, c 205, §2(29)]

Case Notes

Cited: 39 H. 9, 11.

§467-15 Hearings. In every case where it is proposed to refuse to grant a license because of bad character or bad reputation for honesty, truthfulness, or fair dealing, or to revoke or suspend the exercise of any license for any of the causes enumerated in section 467-14, the person concerned shall be given notice and hearing in conformity with chapter 91. The notice shall be given at least five days before the hearing.

In all proceedings before it, the real estate commission and each member thereof shall have the same powers respecting administering oaths, compelling the attendance of witnesses and the production of documentary evidence, and examining witnesses, as are possessed by circuit courts. In cases of disobedience by any person of any order of the commission, or any member thereof, or of any subpoena issued by it, or him, or the refusal of any witness to testify to any matter regarding which he may be questioned lawfully, any circuit judge, on application by the commission, or a member thereof, shall compel obedience as in the case of disobedience of the requirements of a subpoena issued by a circuit court, or a refusal to testify therein. [L 1951, c 77, §6; RL 1955, §170-13; am L 1965, c 96, §112; HRS §467-15; am L 1973, c 31, pt of §21]

§467-16 Real estate recovery fund; use of fund; fees. The real estate commission shall establish and maintain a real estate recovery fund from which any person aggrieved by an act, representation, transaction, or conduct of a duly licensed real estate broker, or real estate salesman, upon the grounds of fraud, misrepresentation, or deceit, may recover by order of the circuit court or district court of the county where the violation occurred, an amount of not more than $10,000 for damages sustained by the fraud, misrepresentation, or deceit, including court costs and fees as set by law, and reasonable attorney fees as determined by the court.

When any person makes application for an original license to practice as a real estate broker or salesman he shall pay, in addition to his original license fee, a fee of $50 for deposit in the real estate recovery fund. If the commission does not issue the license, this fee shall be returned to the applicant. [L 1967, c 187, pt of §1; HRS §467-16; am L 1972, c 54, §1; am L 1973, c 142, §2; am L 1976, c 143, §1]

Rules of Court

Applicability of Hawaii Rules of Civil Procedure, see HRCP, rule 81(b)(12).

§467-17 Additional payments to fund. If, on December 31 of any year, the balance remaining in the real estate recovery fund is less than $150,000, every

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real estate broker, when renewing his license during the following calendar year, shall pay, in addition to his license renewal fee, a fee of $25 for deposit in the real estate recovery fund, and every real estate salesman, when renewing his license during such year, shall pay, in addition to his license renewal fee, a fee of $15 for deposit in the real estate recovery fund. [L 1967, c 187, pt of §1]

§467-18 Statute of limitation; recovery from fund. (a) No action for a judgment which subsequently results in an order for collection from the real estate recovery fund shall be started later than two years from the accrual of the cause of action thereon. When any aggrieved person commences action for a judgment which may result in collection from the real estate recovery fund, the aggrieved person shall notify the real estate commission in writing to this effect at the time of the commencement of such action. The commission may intervene in and defend any such action.

(b) When any aggrieved person recovers a valid judgment in any circuit or district court where the violation occurred against any real estate broker, or real estate salesman, upon the grounds of fraud, misrepresentation, or deceit, which occurred on or after January 1, 1968, the aggrieved person may, upon the termination of all proceedings, including reviews and appeals in connection with the judgment, file a verified claim in the court in which the judgment was entered and, upon ten days written notice to the commission, may apply to the court for an order directing payment out of the real estate recovery fund, of the amount unpaid upon the judgment, subject to the limitations stated in this section. For any cause of action occurring prior to January 1, 1968, the aggrieved person must proceed against the existing bond covering the license which was in force prior to the establishment of the real estate recovery fund.

(c) The court shall proceed upon the application in a summary manner, and, upon the hearing thereof, the aggrieved person shall be required to show:

(1) He is not a spouse of debtor, or the personal representative of such spouse.

(2) He has complied with all the requirements of this section.

(3) He has obtained a judgment as set out in subsection (b) of this section, stating the amount thereof and the amount owing thereon at the date of the application.

(4) He has made all reasonable searches and inquiries to ascertain whether the judgment debtor is possessed of real or personal property or other assets, liable to be sold or applied in satisfaction of the judgment.

(5) That by such search he has discovered no personal or real property or other assets liable to be sold or applied, or that he has discovered certain of them, describing them, owned by the judgment debtor and liable to be so applied, and that he has taken all necessary action and proceedings for the realization thereof, and that the amount thereby realized was insufficient to satisfy the judgment, stating the amount so realized and the balance remaining due on the judgment after application of the amount realized.

(d) The court shall make an order directed to the commission requiring payment from the real estate recovery fund of whatever sum it finds to be payable upon the claim, pursuant to and in accordance with the limitations contained in this section, if the court is satisfied, upon the hearing, of the truth of all matters required to be shown by the aggrieved person by subsection (c) of this section and that the aggrieved person has fully pursued and exhausted all remedies available to him for recovering the amount awarded by the judgment of the court.

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parties signing it, at the time the signature is obtained; provided that only one copy need be delivered to parties signing as cotenants. [L 1957, c 112, §1; Supp, §170-11.5; HRS §467-13; am L 1977, c 197, §1(4)]

Amendment Note

L 1977 deleted "or employing" after "agreement authorizing".

§467-14 Revocation and suspension of licenses. The real estate commission may revoke any license issued hereunder, or suspend the right of the licensee to use the license, for any of the following causes:

(1) Making any misrepresentation concerning any real estate transaction;
(2) Making any false promises concerning any real estate transaction of a character likely to mislead another;
(3) Pursuing a continued and flagrant course of misrepresentation, or making of false promises through advertising or otherwise;
(4) Without first having obtained the written consent so to do of both parties involved in any real estate transaction, acting for both the parties in connection with the transaction, or collecting or attempting to collect commissions or other compensation for his services from both of such parties;
(5) When licensee, being a real estate salesman, accepts any commission or other compensation for the performance of any of the acts hereinabove enumerated in the definition of real estate salesman from any person, copartnership, or corporation other than his employer or the broker with whom he associates or, being a real estate broker or salesman, compensates one not licensed under this chapter to perform any such act;
(6) When the licensee, being a real estate salesman, acts or attempts to act as a real estate broker or represents, or attempts to represent, any real estate broker other than his employer or the broker with whom he is associated;
(7) Failing, within a reasonable time, to account for any moneys belonging to others which may be in the possession or under the control of the licensee;
(8) Any other conduct constituting fraudulent or dishonest dealings;
(9) When the licensee, being a copartnership, permits any member of the copartnership who does not hold a real estate broker's license to actively participate in the real estate brokerage business thereof or permits any employee thereof who does not hold a real estate salesman's license to act as a real estate salesman therefor;
(10) When the licensee, being a corporation, permits any officer or employee of the corporation who does not hold a real estate broker's license to have the direct management of the real estate brokerage business thereof or permits any officer or employee thereof who does not hold a real estate salesman's license to act as a real estate salesman therefor;
(11) When the licensee, being a real estate salesman, fails to file with the commission a written statement setting forth the name of the real estate broker by whom he is employed or with whom he is associated;

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(12) Violating this chapter, chapter 484, 514A, 514E, or 515, or the rules adopted pursuant thereto;

(13) Splitting fees with or otherwise compensating others not licensed hereunder for referring business; provided that a licensed broker may pay a commission to:

(A) A licensed broker of another state, territory, or possession of the United States; or

(B) A broker lawfully engaged in brokerage activity under the laws of a foreign country

if such broker does not conduct in this State any of the negotiations for which a commission is paid;

(14) Commingling the money or other property of his principal with his own;

(15) Adjudicated insane or incompetent.

No license shall be suspended for longer than two years and no person whose license has been revoked shall be eligible to apply for a new license until the expiration of two years. [L 1933, c 140, §11; RL 1935, §7320; am L 1935, c 126, §§1, 5; RL 1945, §7741; am L 1951, c 77, §5; RL 1955, §170-12; am L 1963, c 9, §1; HRS §467-14; am L 1974, c 205, §2(29); am L 1977, c 197, §1(5); am L 1984, c 176, §1 and c 263, §2]

Amendment Note

L 1977 renumbered paragraphs and amended paragraphs (5), (6), (11), (12) and (13).
L 1984—c 176 amended paragraph (13). C 263 amended paragraph (12).

Case Notes

Provision authorizing commission to revoke or suspend license for fee-splitting does not authorize a private right of action for recovery of sales commission paid or to bar a claim for services rendered. 1 H. App. 448, 620 P. 2d 750.

§467-16 Real estate recovery fund; use of fund; fees. The real estate commission shall establish and maintain a real estate recovery fund from which any person aggrieved by an act, representation, transaction, or conduct of a duly licensed real estate broker, or real estate salesman, upon the grounds of fraud, misrepresentation, or deceit, may recover by order of the circuit court or district court of the county where the violation occurred, an amount of not more than $25,000 per transaction for damages sustained by the fraud, misrepresentation, or deceit, including court costs and fees as set by law, and reasonable attorney fees as determined by the court.

• • •

[am L 1983, c 116, §5]

Revision Note

Only the paragraph amended is included in this Supplement.

Amendment Note

L 1983 substituted "$25,000 per transaction" for "$10,000".

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Case Notes

"Any person aggrieved" means any person-claimant involved in one transaction. 4 H. App. 552, 670 P.2d 459.

§467-17 Additional payments to fund. (a) If the balance remaining in the real estate recovery fund is less than $350,000, the department of commerce and consumer affairs shall assess every real estate licensee a license fee of $25 for deposit in the real estate recovery fund.

(b) The failure of the licensee to pay the assessment within sixty days from the date of assessment shall constitute a forfeiture of the license. The commission may impose other penalties or requirements as a condition to restoration of the license. [L 1967, c 187, pt of §1; HRS §467-17; am L 1983, c 116, §6]

Amendment Note

L 1983 amended section generally.

§467-18 Statute of limitation; recovery from fund. • • •

(e) Should the commission pay from the real estate recovery fund any amount in settlement of a claim or toward satisfaction of a judgment against a licensed real estate broker or real estate salesman, the license of the broker or salesman shall be automatically terminated upon the issuance of a court order authorizing payment from the real estate recovery fund. No such broker or salesman shall be eligible to receive a new license until he has repaid in full, plus interest at the rate provided for in section 478-2, the amount paid from the real estate recovery fund on his account. A discharge in bankruptcy shall not relieve a person from the penalties and disabilities provided in this subsection.

• • •

[am L 1984, c 68, §1]

Revision Note

Only the subsection amended is included in this Supplement.

Amendment Note

L 1984 changed interest rate provision.

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NO. 14956

IN THE SUPREME COURT OF THE STATE OF HAWAII

HEINZ KUHNERT and SHERILYN MARIE KUHNERT,	CIVIL NO. 88-3197
Plaintiffs-Appellee,	APPEAL FROM THE (1) JUDGMENT ENTERED ON AUGUST 7, 1990; (2) "FIRST AMENDED JUDGMENT" ENTERED ON OCTOBER 18, 1990; (3) "ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION FOR PRE-JUDGMENT INTEREST FILED ON SEPTEMBER 6, 1990," ENTERED ON OCTOBER 8, 1990; (4) "ORDER DENYING IN PART AND GRANTING IN PART DEFENDANT CLYDE H. ALLISON, LIBBIE & COMPANY, INC., DARLENE M. OSTERMAN AND HERBERT DAVID OSTERMAN'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR, IN THE ALTERNATIVE FOR NEW TRIAL OR REMITTITUR FILED JULY 27, 1990;
vs.	
CLYDE H. ALLISON, LIBBIE & COMPANY, INC., a Hawaii Corporation, MARION LIBBIE KAMISUGI, DARLENE M. OSTERMAN, HERBERT DAVID OSTERMAN, John Doe 1-5, Doe Corporation 1-5, Doe Partnership 1-5, And Doe Governmental Entity 1-5,	
Defendants -Appellant.	

) DEFENDANTS CLYDE
) H. ALLISON, LIBBIE &
) COMPANY, INC.,
) DARLENE OSTERMAN
) AND HERBERT DAVID
) OSTERMAN'S
) SUPPLEMENTAL
) MEMORANDUM IN
) SUPPORT OF THEIR
) MOTION FILED JULY
) 27, 1990, FILED ON
) AUGUST 20, 1990;
) SUPPLEMENTAL
) AFFIDAVIT OF JOHN
) HOUK IN SUPPORT OF
) DEFENDANTS'
) MOTION FILED JULY
) 17, 1990, FILED ON
) SEPTEMBER 6, 1990,
) AND DEFENDANT
) MARION LIBBIE
) KAMISUGI'S MOTION
) FOR JUDGMENT
) NOTWITHSTANDING
) THE VERDICT
) RENDERED ON JUNE
) 19, 1990, OR IN THE
) ALTERNATIVE FOR A
) NEW TRIAL OR
) REMITTITUR FILED ON
) JULY 27, 1990:
) DEFENDANT MARION
) LIBBIE KAMISUGI'S
) AMENDED MOTION
) FILED ON AUGUST 20,
) 1990; DEFENDANT
) MARION LIBBIE
) KAMISUGI'S

) SUPPLEMENTAL
) MEMORANDUM IN
) SUPPORT OF
) DEFENDANT MARION
) LIBBIE KAMISUGI'S
) AMENDED MOTION
) FILED ON AUGUST 20,
) 1990, FILED ON
) AUGUST 27, 1990;
) DEFENDANTS MARION
) LIBBIE KAMISUGI'S
) SECOND
) SUPPLEMENTAL
) MEMORANDUM IN
) SUPPORT OF
) DEFENDANT MARION
) LIBBIE KAMISUGI'S
) AMENDED MOTION
) FILED ON AUGUST 20,
) 1990, FILED ON
) SEPTEMBER 6, 1990"
) ENTERED ON
) OCTOBER 18, 1990; and
) (5) "FIRST AMENDED
) NOTICE OF TAXATION
) OF COSTS; BILL OF
) COSTS" FILED ON
) SEPTEMBER 20, 1990

) FIRST CIRCUIT COURT
)
) HONORABLE ROBERT
) G. KLEIN
) HONORABLE PHILIP T.
) CHUN
) HONORABLE TENNEY
) TONGG
) HONORABLE LELAND
) H. SPENCER

DEFENDANT-APPELLANT
MARION LIBBIE KAMISUGI'S OPENING BRIEF
APPENDICES "A" THROUGH "E"

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NO. 14956

IN THE SUPREME COURT OF THE STATE OF HAWAII

HEINZ KUHNERT and SHERILYN MARIE KUHNERT,	CIVIL NO. 88-3197
Plaintiffs-Appellee,	APPEAL FROM THE (1) JUDGMENT ENTERED ON AUGUST 7, 1990; (2) "FIRST AMENDED JUDGMENT" ENTERED ON OCTOBER 18, 1990; (3) "ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION FOR PRE-JUDGMENT INTEREST FILED ON SEPTEMBER 6, 1990," ENTERED ON OCTOBER 8, 1990; (4) "ORDER DENYING IN PART AND GRANTING IN PART DEFENDANT CLYDE H. ALLISON, LIBBIE & COMPANY, INC., DARLENE M. OSTERMAN AND HERBERT DAVID OSTERMAN'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR, IN THE ALTERNATIVE FOR NEW TRIAL OR REMITTITUR FILED JULY 27, 1990;
vs.	
CLYDE H. ALLISON, LIBBIE & COMPANY, INC., a Hawaii Corporation, MARION LIBBIE KAMISUGI, DARLENE M. OSTERMAN, HERBERT DAVID OSTERMAN, John Doe 1-5, Doe Corporation 1-5, Doe Partnership 1-5, And Doe Governmental Entity 1-5,	
Defendants -Appellant.	

) DEFENDANTS CLYDE
) H. ALLISON, LIBBIE &
) COMPANY, INC.,
) DARLENE OSTERMAN
) AND HERBERT DAVID
) OSTERMAN'S
) SUPPLEMENTAL
) MEMORANDUM IN
) SUPPORT OF THEIR
) MOTION FILED JULY
) 27, 1990, FILED ON
) AUGUST 20, 1990;
) SUPPLEMENTAL
) AFFIDAVIT OF JOHN
) HOUK IN SUPPORT OF
) DEFENDANTS'
) MOTION FILED JULY
) 17, 1990, FILED ON
) SEPTEMBER 6, 1990,
) AND DEFENDANT
) MARION LIBBIE
) KAMISUGI'S MOTION
) FOR JUDGMENT
) NOTWITHSTANDING
) THE VERDICT
) RENDERED ON JUNE
) 19, 1990, OR IN THE
) ALTERNATIVE FOR A
) NEW TRIAL OR
) REMITTITUR FILED ON
) JULY 27, 1990:
) DEFENDANT MARION
) LIBBIE KAMISUGI'S
) AMENDED MOTION
) FILED ON AUGUST 20,
) 1990; DEFENDANT
) MARION LIBBIE
) KAMISUGI'S

) SUPPLEMENTAL
) MEMORANDUM IN
) SUPPORT OF
) DEFENDANT MARION
) LIBBIE KAMISUGI'S
) AMENDED MOTION
) FILED ON AUGUST 20,
) 1990, FILED ON
) AUGUST 27, 1990;
) DEFENDANTS MARION
) LIBBIE KAMISUGI'S
) SECOND
) SUPPLEMENTAL
) MEMORANDUM IN
) SUPPORT OF
) DEFENDANT MARION
) LIBBIE KAMISUGI'S
) AMENDED MOTION
) FILED ON AUGUST 20,
) 1990, FILED ON
) SEPTEMBER 6, 1990"
) ENTERED ON
) OCTOBER 18, 1990; and
) (5) "FIRST AMENDED
) NOTICE OF TAXATION
) OF COSTS; BILL OF
) COSTS" FILED ON
) SEPTEMBER 20, 1990

) FIRST CIRCUIT COURT
)
) HONORABLE ROBERT
) G. KLEIN
) HONORABLE PHILIP T.
) CHUN
) HONORABLE TENNEY
) TONGG
) HONORABLE LELAND
) H. SPENCER

DEFENDANT-APPELLANT MARION LIBBIE KAMISUGI'S OPENING BRIEF

I. STATEMENT OF JURISDICTION

This is an appeal taken pursuant to Rules 3 and 4 of the Hawaii Rules of Appellate Procedure and 602-5 and 641-12 of the Hawaii Revised Statutes (1985 Repl.) from: (1) the Judgment entered on August 7,1990 ("Judgment") (Record on Appeal, Volume 6, page 221)[1]1; (2) the First Amended Judgment entered on October 18, 1990 ("First Amended Judgment") (R:V7:109); (3) the "Order Granting In Part And Denying In Part Plaintiffs' Motion For Prejudgment Interest Filed On September 6, 1990," entered on October 18, 1990 ("Order Re: Prejudgment Interest") (R:V7:126); (4) the "Order Denying In Part And Granting In Part Defendant Clyde H. Allison, Libbie & Company, Inc., Darlene M. Osterman and Herbert David Osterman's Motion For Judgment Notwithstanding The Verdict Or, In The Alternative For New Trial Or Remittitur Filed July 27, 1990; Defendants Clyde H. Allison, Libbie & Company, Inc., Darlene

[1]Citations to the Record on Appeal will hereinafter appear as (R:V volume number:page number(s)). -2-

Osterman And Herbert David Osterman's Supplemental Memorandum In Support Of Their Motion Filed 7/27/90, Filed On August 20, 1990; Supplemental Affidavit Of John Houk In Support 0f Defendants' Motion Filed 7/27/90, Filed On September 6, 1990 And Defendant Marion Libbie Kamisugi's Motion For Judgment Notwithstanding The Verdict Rendered On June 19, 1990, Or In The Alternative For A New Trial Or Remittitur Filed On July 27, 1990; Defendant Marion Libbie Kamisugi's Amended Motion Filed On August 20, 1990; Defendant Marion Libbie Kamisugi's Supplemental Memorandum In Support Of Defendant Marion Libbie Kamisugi's Amended Motion Filed On August 20, 1990, Filed On August 27, 1990; Defendant Marion Libbie Kamisugi's Second Supplemental Memorandum In Support Of Defendant Marion Libbie Kamisugi's Amended Motion Filed On August 20, 1990, Filed On September 6, 1990," entered on October 18, 1990, (hereinafter "Order Denying Motions for JNOV/New Trial") (R:V7:115); and (5) the "First Amended Notice Of Taxation Of Costs; Bill Of Costs" filed on September 20, 1990 (R:V7:97).

This case was tried before a jury from May 10, 1990, to June 19, 1990. The jury submitted its Special Verdict on June 19, 1990. (R:V6:1). Judgment was entered on August 7, 1990. (R:V6:221). The First Amended Judgment was entered on October 18, 1990. (R:V7:109). A Notice of Appeal was timely filed on November 16, 1990 by Defendant-Appellant/Cross-Appellee Marion Libbie Kamisugi ("Kamisugi"). (R:V7:139).[2] On November 29, 1990, Plaintiffs- Appellees/Cross-Appellants Heinz Kuhnert

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[2]Timely Notices of Appeal were also filed by: (1) Defendants-Appellants/Cross-Appellees Clyde H. Allison ("Allison") and Libbie & Company, Inc. (the "Company") on November 16, 1990 (R:V7:179); and (2) Defendants-Appellants/Cross-Appellees Darlene M. Osterman and Herbert David Osterman (collectively "Ostermans") on November 19, 1990 (R:V7:216). Although all defendants were represented by the same counsel at trial, Kamisugi, Allison and the Company, and the Ostermans, respectively, have independent counsel for purposes of the present appeal.

and Sherilyn Kuhnert (collectively "Kuhnerts") filed their Notice of Cross-Appeal. (R:V7:263). The case was docketed on March 5, 1991, pursuant to An order granting an extension of time to docket the Record on Appeal. (R:V8:54). On May 6, 1991, Kamisugi's Stipulation to Modify Record on Appeal (R:V8:126) and Kuhnerts' Limited Motion to Supplement Record on Appeal (R:V8:131) were approved.

An appropriate extension of time for filing this brief was granted on April 1, 1991. This brief is timely.

The Hawaii Supreme Court and the Intermediate Court of Appeals have jurisdiction to entertain this appeal pursuant to Haw. Rev. Stat. §602-5 and §602-57 (1985 Repl.), respectively.

II. STATEMENT OF THE CASE

The present dispute arises out of the sale of a house located at 3762 Old Pali Road ("Nuuanu Property") by Heinz W. Kuhnert and Sherilyn Marie Kuhnert ("Kuhnerts") to Darlene M. Osterman and Herbert David Osterman ("Ostermans") in 1983. Based upon alleged improprieties relating to the sale of the Nuuanu Property to the Ostermans, the Kuhnerts filed a lawsuit on October 13, 1988 against:

(1) the Ostermans, the purchasers of the Nuuanu Property;

(2) Clyde H. Allison ("Allison"), the real estate agent who was retained by the Kuhnerts to assist in the selling of the Nuuanu Property;

(3) Libbie & Company, Inc. (the "Company"), the real estate brokerage company that Allison worked with at the time of the transaction; and

(4) Marion Libbie Kamisugi ("Kamisugi"), the owner of the Company. (R:Vl:l). In the Complaint,

> the Kuhnerts alleged fraudulent inducement, promissory estoppel, breach of fiduciary duty, and unfair and deceptive trade practices, and sought to rescind the sale of the Nuuanu Property and/or to recover compensatory and punitive damages.

(R:Vl:1).[3]

A. RELATIONSHIP BETWEEN THE KUHNERTS AND CLYDE ALLISON AND LIBBIE & COMPANY.

The Kuhnerts owned the Nuuanu Property from 1979 through June 23, 1983. Transcript dated June 4, 1990, p. 39.[4] On August 23, 1982, the Kuhnerts entered into an exclusive listing agreement with Allison for the purpose of selling the Nuuanu Property. (Tr. 5/18/90:156; Tr. 6/4/90:76). Allison executed the exclusive listing agreement for the Company. (Tr. 5/18/90:148; Plaintiffs' Exhibit No. 9). The Company was licensed by the State of

[3]Plaintiffs did not assert a negligence claim against Kamisugi at trial. In fact, Plaintiffs' counsel has admitted that the applicable statute of limitations has expired with respect to any tort and/or negligence claim against any of the defendants. During the deposition of Kamisugi taken on December 13, 1988, plaintiffs' counsel stated:

> Now, my reason for asking this question is because the original lawsuit claimed negligence, and your lawyer can explain that to you.
>
> The amended lawsuit **took out negligence, because apparently the two-year statute of limitations had ran after the case was dismissed from the court for nonservice,** so now the amended lawsuit is only on fraud, essentially, negligent misrepresentation, but it sounds primarily on fraud.

(R:V6:160) Therefore, any claim by the plaintiffs for breach of fiduciary duties must be based on a contract, such as a listing agreement.

[4]Citations to Transcripts in the Record on Appeal will hereinafter appear as (Tr. date of transcript:page number).

Hawaii to engage in the business of real estate sales and brokerage. (R:Vl:1; R:V1:27). Kamisugi did not sign the Listing Contract. (Plaintiffs' Exhibit No. 9). Moreover, Kamisugi was not identified as the real estate broker on the Listing Contract. (Plaintiffs' Exhibit No. 9). See, Appendix "B". (R:V7:3).

B. MARKETING OF THE NUUANU PROPERTY TO THE OSTERMANS.

On Sunday, June 19, 1983, the Company held an open house at the Nuuanu property. Neither Allison nor Kamisugi were present at the open house; other realtors associated with the Company hosted the open house. (Tr. 5/16/90:107). The Ostermans' first visit to the Nuuanu Property occurred when they attended that open house. (Tr. 5/16/90:105). Neither Allison or Kamisugi knew the Ostermans prior to the open house.

Allison and the Ostermans had a telephone conversation regarding the Nuuanu Property on the Monday or Tuesday after the open house. (Tr. 5/16/90:110). On approximately Tuesday afternoon, Allison showed the Nuuanu Property to the Ostermans. (Tr. 5/16/90:113). The Ostermans and Allison had a second telephone conversation following the Tuesday inspection, and it was agreed that the Ostermans would meet with the Kuhnerts to discuss the Nuuanu Property. (Tr. 5/16/90:121). It is **undisputed that Kamisugi did not participate in any of the telephone conversations between Allison and the Ostermans, and that Kamisugi did not attend the Tuesday inspection of the Nuuanu Property.** (Tr. 5/16/90:110-121).

Allison inspected the Ostermans' penthouse condominium on Wednesday, June 22, 1983. (Tr. 5/16/90:136). At that time, Allison discussed the estimated value of the Ostermans' penthouse condominium. (Tr. 5/16/90:141). **It is undisputed that Kamisugi did not inspect the Ostermans' penthouse condominium with**

Allison, nor did she provide specific input to the valuation of the condominium. (Tr. 5/16/90:136-141).

On June 22, 1983, Allison called Mr. Kuhnert to notify him that there was a couple interested in buying the Nuuanu Property. (Tr. 6/6/90:138). During that phone conversation, a meeting between the Kuhnerts and the Ostermans was arranged for June 23, 1983 at noon at the Kuhnerts' Hawaii Kai home. (Tr. 6/6/90:139-140). According to Mr. Kuhnert, Allison represented that both he (Allison) and Kamisugi would attend the meeting. (Tr. 6/6/90:140). Mr. Kuhnert further testified that Kamisugi called on June 23, 1983, and confirmed the meeting with the Ostermans. Kamisugi alleged stated that she wasn't certain that she would be able to attend the meeting. (Tr. 6/6/90:140-141).

On June 23, 1983, Allison, the Ostermans and the Kuhnerts met at the Kuhnerts' Hawaii Kai home. (Tr. 5/16/90:150; Tr. 6/6/90:142). At the meeting, Allison prepared a DROA which was then signed by Mr. Kuhnert, on behalf of himself and his wife, and the Ostermans. (Tr. 5/16/90:162). **It is undisputed that Kamisugi was not at the June 23, 1983 meeting, and that she did not prepare the DROA for signature by the parties.** (Tr. 5/16/90:150-162; Tr. 6/6/90:142).

C. SCOPE OF KAMISUGI'S INVOLVEMENT IN THE SALE.

Even when the evidence is viewed most favorably for Kuhnerts, Kamisugi's **personal** involvement in the procurement, preparation and execution of the DROA is limited to the following: (1) Kamisugi was generally aware that Allison was gathering pricing data for condominiums comparable to a condominium owned by a potential buyer of the Nuuanu home. She did not know who the potential buyer was, where the condominium was located or what comparables were being gathered (Tr. 6/14/90:120-140); (2) Allison asked Kamisugi whether it

was possible to structure a transaction where part of the sales price would be guaranteed by the sale of property owned by the buyer. Kamisugi did not know who the buyer was, the sales price to be negotiated or any details. Her discussion with Allison was theoretical and academic in nature and substance (Tr. 6/14/90:120-140); and (3) Mr. Kuhnert testified that he had a telephone conversation with Kamisugi in the morning of the day that the DROA was executed. He testified that he asked her if she would be going to the meeting that afternoon. According to Kuhnert, Kamisugi told him that she would not be attending the meeting. (Tr. 6/6/90:140). Kamisugi testified that no such call was made. (Tr. 6/14/90:123).

Other than the above three events, Kamisugi had no involvement whatsoever in the negotiation, drafting or execution of the DROA. It is uncontroverted that Kamisugi did not review the DROA until it was presented to her at the Waikiki Yacht Club **after** it had been signed by both parties. (Tr. 5/22/90:32-65).

III. STATEMENT OF POINTS ON APPEAL

A. The trial court erred in submitting the Special Verdict to the jury, because:

1. the Special Verdict improperly lists Kamisugi together with the Company in interrogatories nos. 1, 2, 3, 4 and 6, and thereby prevented the jury from applying the evidence and law to Kamisugi individually;
2. the Special Verdict improperly allowed the jury to assess joint and several liability against Libbie Kamisugi and Libbie & Company, Inc.; and
3. the Special Verdict improperly allowed the jury to impose vicarious liability upon Libbie Kamisugi for the acts of Libbie & Co.

The Special Verdict was submitted to the jury over objection (Tr. 6/15/90:20-22).[5] Notwithstanding the scope of the objection asserted at trial, the Special Verdict consitutes plain error.

B. The trial court erred in finding that Libbie Kamisugi committed "fraudulent misrepresentation or fraudulent concealment" because the record does not contain clear and convincing evidence that Libbie Kamisugi committed fraudulent misrepresentation or fraudulent concealment with regard to the Transaction. (R:V6:1-5).

C. The trial court erred in finding that the "fraudulent misrepresentation and/or concealment by Libbie Kamisugi was a legal cause of actual damage" to the Kuhnerts because the record does not contain clear and convincing evidence that any conduct by Libbie Kamisugi caused damage to the Kuhnerts. (R:V6:1-5).

D. The trial court erred in finding that Libbie Kamisugi "breached a fiduciary duty" to the Kuhnerts because the record does not contain substantial evidence that: a) Libbie Kamisugi owed a fiduciary duty to the Kuhnert; and b) Libbie Kamisugi breached such a duty. (R:V6:1-5).

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[5]The nature of the objection to the Special Verdict Form was stated as follows:

MS. EGLI: The defendants would like to not that the court has, in the verdict form, listed Clyde Allison together with Libbie & Company and, also, Libbie Kamisugi together with Libbie & Company. We understand that it's the court's feeling that they are both officers of the company and that the company, acting through them, should be listed as such.

* * * * * *

THE COURT: All right, **so without prejudice to your objection that the corporation be vicariously liable for punitive damages by reason of the conduct of these individuals,** you don't object to Libbie & Company being in the verdict form in the form that it's in? (Emphasis added).

E. The trial court erred in finding that Libbie Kamisugi should "be assessed with punitive damages" because the record does not contain clear and convincing evidence that Libbie Kamisugi acted wantonly, oppressively, or with such malice to warrant an award of punitive damages. (R:V6:1-5).

F. The trial court erred in denying Libbie Kamisugi's motion for new trial because the Special Verdict and resulting First Amended Judgment was contrary to the clear weight of the evidence. (R:V7:115-121).

G. The trial court erred in denying Libbie Kamisugi's motion for judgment notwithstanding the verdict because there was no substantial evidence to support recovery by the Kuhnerts against Libbie Kamisugi on any of the claims asserted by the Kuhnerts. (R:V7:115-121).

H. The trial court erred in denying Libbie Kamisugi's motion for directed verdict on the issue of fraudulent misrepresentation and fraudulent concealment because there was no substantial evidence to support such a claim against Kamisugi. (Tr. 6/13/90:114).

I. The trial court erred in granting Kuhnert's motion for prejudgment interest because it awarded prejudgment for a period long before Kuhnert expressed any interest in discussing settlement of the case. (R:V7:126-128).

J. The trial court erred in submitting Jury Instruction No. 22 (Plaintiffs' Proposed Jury Instruction No. 155) to the jury. The instruction stated:

> If several persons combined and conspired to effect a common object and it is arranged that each shall do certain acts and perform certain parts with a view to the attainment of the same common result and an overt act is committed in furtherance of the common

> object, then all persons will be responsible for the acts of each of them.

(Tr. 6/15/90:37). The instruction constitutes plain error because: (a) Kuhnerts failed to plead conspiracy and/or to present any credible evidence that the Defendants entered into a conspiracy; (b) Kuhnerts failed to establish that Defendants committed an overt act or act in furtherance of the agreed upon objective of the alleged conspiracy; (c) the instruction incorrectly defined the elements of conspiracy by failing to mention any element of unlawfulness; and (d) the instruction failed to include a statement regarding the applicable standard of proof for a conspiracy claim -- clear and convincing evidence.

K. The trial court erred in admitting evidence relating to the listing price of the Nuuanu Property in July 1988. (Tr. 5/17/90:105).[6]

L. The trial court erred in submitting Jury Instruction No. 31 to the jury. The instruction stated:

> The plaintiffs claim that defendants Libbie & Company, Inc., Libbie Kamisugi, and/or Clyde Allison breached a fiduciary duty to the plaintiffs. To recover damages for breach of fiduciary duty, the plaintiffs must prove each of the following: That a defendant owed a fiduciary duty to the plaintiffs; that a

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[6]The objection was noted as follows:

A. We listed the house in, I think it was, in June or July of 88.

Q. For how much?

MS. EGLI: Your honor, objection. That's not relevant to this case.

THE COURT: I'm going to overrule the objection. I'll permit the question to be asked. MR. AU: Thank you, Judge.

Q. (by MR. AU) For how much, please?

A. I think it was $4,100,000.

> defendant breached a fiduciary duty owed to the plaintiffs; and that plaintiffs suffered damages as a result of said breach of fiduciary duty.

(Tr. 6/15/90:51). The instruction constitutes plain error because, when read with the Special Verdict, it gave the jury the unmistakable impression that the breach of fiduciary duty by a defendant entitled plaintiffs to recover damages from all defendants.

M. The trial court erred in denying Kamisugi's motion for remittitur on the special damages award of $78,000.00, which amount represented the commission paid by the Kuhnerts to the Company, and on the remaining portion of punitive damages assessed against Kamisugi in the amount of $293,000.00.

IV. STANDARD OF REVIEW

Points A, G, H involve alleged errors of law and are reviewable under the de novo standard of review. Molokoa Village Dev. Co., Ltd. v. Kauai Electric Co., 60 Haw. 582, 593 P.2d 375 (1979); Shishido v. State, 4 Haw. App. 321, 666 P.2d 608 (1983).

Points B, C, D, E involve alleged errors of fact and are reviewable under the "no substantial evidence" standard. MPM Hawaiian, Inc. v. Amigos, Inc., 63 Haw. 485, 630 P.2d 1075 (1981).

Points F, I, M involve discretionary decisions and are reviewable under the abuse of discretion standard. Stahl v. Balsara, 60 Haw. 144, 587 P.2d 1210 (1978).

Points J and L involve charging the jury with an erroneous statement of the law are reviewable under the presumption that the erroneous instructions are presumptively harmful and are grounds for reversal unless it appears from the entire record that the erroneous instruction was not prejudicial. Agee v. Kahului Trucking & Storage,

Inc., 67 Haw. 365, 688 P.2d 256 (1984); Turner v. Willis, 59 Haw. 319, 582 P.2d 710 (1978).

Point K involves the admission of prejudicial evidence and is reviewable under the harmful error standard. Lennen & Newell, Inc. v. Clark Enterprises, Inc., 51 Haw. 233, 456 P.2d 231 (1969).

V. STATEMENT OF THE QUESTIONS PRESENTED

A. Whether the trial court erred in assessing punitive damages against Kamisugi where:

1. the Special Verdict form erroneously grouped Kamisugi with the Company in all interrogatories relating to punitive damages, thereby forcing the jury to consider Kamisugi's liability for punitive damages jointly with the Company;

2. there was no substantial evidence of a clear and convincing nature to support the assessment of punitive damages against Kamisugi; and

3. the punitive damages award against Kamisugi was in the nature of joint and several liability with the Company.

B. Whether the trial court erred in assessing compensatory damages against Kamisugi where:

1. the Special Verdict form erroneously grouped Kamisugi with the Company in the all interrogatories relating to the claims of fraud and breach of fiduciary duty;

2. there was no substantial evidence of a clear and convincing nature to support the finding that Kamisugi committed any fraudulent acts;

3. there was no substantial evidence to support the finding that Kamisugi breached any fiduciary duty owed to the Kuhnerts; and

4. there were erroneous jury instructions pertaining to: (a) a "conspiracy"; and (b) the standard for determining a breach of fiduciary duty.

C. Whether the trial court erred in awarding prejudgment interest to the Kuhnerts.

VI. SUMMARY OF ARGUMENT

This case arises from allegations of fraudulent inducement. The Kuhnerts claim that they were misled into signing the DROA with the Ostermans because of fraudulent misrepresentations and/or concealment of material facts. Specifically, the Kuhnerts contend that the Ostermans, Allison, the Company and Kamisugi fraudulently induced the Kuhnerts into accepting the Ostermans' allegedly over-valued condominium as part of the purchase price for the Kuhnerts' Nuuanu Property.

The uncontroverted evidence presented at trial established the following facts which bear upon the claims against Kamisugi: (l) The Kuhnerts did not have any contractual relationship with Kamisugi - the Listing Contract was signed by Allison on behalf of the Company which acted as the Kuhnerts' real estate broker; (2) The Company was licensed by the State of Hawaii to engage in the business of real estate sales and brokerage; (3) Kamisugi did not meet with the Ostermans prior to the execution of the DROA; (4) Kamisugi was not at the meeting when the

DROA was drafted and signed; and (5) Kamisugi did not see the DROA until after it had been fully executed.

Despite the foregoing, the trial court assessed punitive and compensatory damages against Kamisugi personally for her "involvement" in the "conspiracy" to defraud the Kuhnerts. The judgment was based on the following jury findings:

1. **"Libbie Kamisugi and Libbie & Company, Inc." committed fraudulent** misrepresentation or fraudulent concealment which caused damage to the plaintiffs. (Special Verdict questions Nos. 1 and 2).

2. **"Libbie Kamisugi and Libbie & Company,** Inc." breached a fiduciary duty to the plaintiffs which caused damage to the plaintiffs. (Special Verdict questions Nos. 3 and 4). 3. The special damages suffered by the plaintiffs was $495,625.00. The general damages suffered by Heinz Kuhnert was $20,000.00. The general damages suffered by Sherilyn Kuhnert was $10,000.00. (Special Verdict question No. 5).

4. **"Libbie Kamisugi and Libbie & Company, Inc."** should be assessed with punitive damages of $1,465,000.00. (Special Verdict question No. 6).

See Appendix "A".

Kamisugi respectfully submits that the judgment entered against Kamisugi is clearly erroneous due to the faulty form of Special Verdict submitted to the jury. Indeed, this Honorable Court can only speculate as to the jury's findings against Kamisugi personally because every interrogatory pertaining to her liability grouped Kamisugi with the Company. It was impossible for the jury to answer any of the questions which addressed the liability of

Kamisugi personally without incorporating their evaluation of the Company's alleged wrongdoing.

The confusion and prejudice arising from the faulty Special Verdict form is highlighted by the imposition of personal liability against Kamisugi where the record lacks substantial evidence of a clear and convincing nature to support the findings that: (1) Kamisugi **personally** committed fraudulent misrepresentation or fraudulent concealment; and (2) Kamisugi **personally** acted wantonly or oppressively or with such malicious as implies a spirit of mischief or criminal indifference to civil obligations to justify the award of punitive damages against Kamisugi. Similarly, the record lacks sufficient evidence to support the finding that Kamisugi **personally** owed a fiduciary duty to the plaintiffs and thereafter breached such duty.

The trial court attempted to reduce the gravity of error arising from the jury's passion and prejudice by remitting the punitive damages award from $1,465,000 to $293,000 -- an eighty percent reduction. However, the error was not fully remedied: the trial court denied Kamisugi's motion for JNOV/New Trial and entered a First Amended Judgment against Kamisugi "pursuant to the Special Verdict returned by the jury on June 19, 1990." (Tr. 9/7/90:57)

VII. ARGUMENT

A. THE DEFECTIVE SPECIAL VERDICT FORM UNDULY PREJUDICED KAMISUGI WITH RESPECT TO ALL CLAIMS ASSERTED AGAINST HER AND IS THEREFORE PLAIN ERROR.

Kamisugi respectfully submits that the Special Verdict was patently defective because the grouping of Kamisugi **and the Company** in the Special Verdict was improper and constitutes plain error. 9 Wright & Miller, Federal Practice and Procedure: Civil 2508.

The Special Verdict, as submitted by the trial court, forced the jury to consider the claims against Kamisugi jointly with the claims against a separate co-defendant, the Company, on every question submitted by the trial court. Thus, it was impossible for the jury to answer any of the questions pertaining to Kamisugi **personally** without incorporating their evaluation of the Company's alleged wrongdoing. The trial court in reviewing Kamisugi's Motion for JNOV/Motion for New Trial could only guess as to the basis for the jury's findings against Kamisugi.

The trial court examined the propriety of submitting the Special Verdict to the jury in connection with Kamisugi's Motion for JNOV/Motion for New Trial. In denying the motion, the trial court held, as a matter of law, that the objections to the form of the Special Verdict, apart from the objection pertaining to the vicarious liability of the Company for the acts of Allison and/or Kamisugi, had been waived.[7] Kamisugi respectfully submits that the form of the Special Verdict constitutes plain error that requires a reversal of the award of punitive and compensatory damages against Kamisugi. At a minimum, the improper listing of Kamisugi with the Company requires a new trial since it is impossible to accurately determine whether any of the findings by the jury were directed at Kamisugi personally. Cf. Brunner v. Maritime Overseas Corp., 779 F.2d 292 (5th Cir.), cert. denied, 476 U.S. 1115, 106 S.Ct. 1971, 90 L.Ed.2d 655 (1986) (appellants did not waive their right to complain of inconsistent answers from the jury by failing to object at trial where answers to jury interrogatories are in irreconcilable conflict.)

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[7]The trial court stated: Defendants also contend that the verdict form was erroneous and is itself a basis for a new trial.

* * * * *

The Court also finds that no objection was made to the verdict form at the time the verdict form was settled on the record, with respect to the complaints raised in these post trial motions. And thus, such complaints have been waived. (Tr. 8/29/90 65-66).

1. The Defective Special Verdict Form Enabled The Jury To Assess Punitive Damages Against Kamisugi Based On Conduct and Financial Status Of The Company.

The Special Verdict allowed the jury to impose such damages without making a specific finding that Kamisugi **personally** acted wantonly or oppressively or with such malice as implies a spirit of mischief or criminal indifference to civil obligations. In fact, it is impossible to determine from the Special Verdict whether the punitive damages assessed against Kamisugi were based upon: (1) personal wrongdoing by Kamisugi or (2) vicarious liability imposed upon Kamisugi for the wrongdoing of other parties.

It is universally recognized that punitive damages are those damages assessed in addition to compensatory damages for the dual purposes of: (1) punishing the defendant for his aggravated or outrageous misconduct; and (2) deterring the defendant and others from engaging in like conduct in the future. Thus, the award of punitive or exemplary damages is an exception to the general rule that damages are aimed at compensating the victim for his injuries. Masaki v. General Motors, et al., 71 Haw. 1, 780 P.2d 566 (1989) ("[s]ince the purpose of punitive damages is not compensation of the plaintiff but rather punishment and deterrence, **such damages are awarded only when the egregious nature of the defendant's conduct makes such a remedy appropriate**"); Lauer v. Young Men's Christians Association of Honolulu, 57 Haw. 390, 402, 557 P.2d 1334, 1342 (1976) (noting that the award of punitive or exemplary damages constitutes an exception to the purely compensatory aspect of the damages concept as a means to right a wrong, the court stated ''[t]he **deterrent or retributive effect of punitive damages must be placed squarely on the shoulders of the wrongdoer**");

Restatement (Second) of Torts 908; Restatement (Second) of Torts 909, Comment (b) (the reasons for awarding punitive damages "make it improper ordinarily to award punitive damages against one who himself is personally innocent and therefore liable only vicariously"). It follows that in assessing whether an award of punitive damages is appropriate with regard to a particular defendant, it is necessary to focus on actions of **that defendant** to determine: (1) his mental state and (2) the nature of his conduct. Masaki, 71 Haw. at 6, 780 P.2d at 570 (citing D. Dobbs, Handbook on the Law of Remedies, 3.9, at 205 (1973)).

Similarly, the amount of punitive damages must be based on the financial status of the individual defendant being assessed with punitive damages. Comegys v. Chrysler Credit Corp., 577 S.W. 2d 873 (Mo. App. 1979); Rose v. Whiteack, 278 Ore. 463, 564 P.2d 671 (Ore. App. 1977) (a defendant was entitled to a retrial on the issue of punitive damages following the dismissal of a co-defendant where the jury may have considered the wealth of both defendants in determining the amount of punitive damages). In Comegys, the court noted that "punitive damages are based (among other things) upon the defendant's ability to pay." Noting that the award of punitive damages against a defendant may have been influenced by the financial ability of another defendant with greater resources, the court held that a new trial was required.

Consistent with the above, the imposition of punitive damages has been analogized to the impositions of **criminal** penalties. Masaki v. General Motors, et al., 71 Haw. 1, 6, 780 P.2d 566, 570 (1989) Restatement (Second) of Torts 908. In that regard, punitive damages have often been called "civil fines" for criminal conduct. Embrey v. Holly, 293 Md. 128, 442 A.2d 966 (Md. 1982).

The nature of the Special Verdict precluded the jury from awarding punitive damages based on a careful

evaluation of the independent culpability and financial resources of Kamisugi. Rather, by grouping Kamisugi with the Company, the Special Verdict forced the jury to consider the combined culpability and financial resources of Kamisugi and the Company in evaluating the punitive damages claim against Kamisugi.

2. The Defective Special Verdict Form Led To The Improper Assessment Of Joint And Several Liability For Punitive Damages Against Kamisugi.

The improper form of the Special Verdict resulted in the assessment of joint and several liability against Kamisugi and the Company for punitive damages. This is clearly improper. It is the majority rule that punitive damages can only be assessed individually against defendants based upon the individual culpability of each defendant, and that the assessment of joint and several liability for punitive damages is improper. As explained in Ivy McFadden v. Detective Juan Sanches, 710 F.2d 907 (1983):

> An award of punitive damages punishes a defendant who has acted intentionally or recklessly to deny a plaintiff his protected rights, Smith v. Wade, supra, 103 S. Ct. at 1640, and helps secure rights for others by deterring future violations, id. at 1639. The degree of appropriate punishment and the extent to which deterrence may be achieved at an individual's expense are obviously matters appropriate for individualized determination. As the Court noted, punitive damages turn on "the character of the tortfeasor's conduct."
>
> * * * * *

> In modern times American jurisdictions have come to the conclusion that punitive damages should be assessed on an individual basis. A plaintiff who seeks to recover punitive damages from joint tortfeasors must "establish that each defendant against whom punitive damages are sought engaged in conduct which was sufficiently aggravated to justify the imposition of those damages." J. Ghiardi & J. Kircher, supra, at 9.09, at 27. This rule contemplates not only individual determination of each defendant's liability for punitive damages but also individual determination of the amount for which each defendant is liable.

McFadden, 710 F.2d at 913.

Similarly, in Pfeifer v. Copperstone Restaurant and Lounge, 71 Or. App. 599, 693 P.2d 644 (Or. App. 1985), the court rejected the plaintiffs claims that defendants should be jointly and severally liable for the punitive damage awards assessed by the jury. The court explained:

> There is no logic in holding one defendant liable for the share of punitive damages intended by the jury to deter the conduct of a codefendant. *** [I]t is preferable to submit verdict forms allowing [punitive damages to be assessed independently] when there is a claim for punitive damages against more than one defendant. Rose (Betty) v. Whiteack, supra, 278 Ore. at 467-68.

Pfeifer, 693 P.2d at 651. The court held that "the jury in this case assessed punitive damages separately, and the judgment provided that defendants are liable only for those punitive damages awarded against them separately. There is no error." Pfeifer, 693 P.2d at 651.

In Gagnon v. Bell, 696 F.2d 17 (2d Cir. 1982), the court similarly held that while compensatory damages could be assessed jointly and severally, punitive damages must be assessed individually. As in the instant case, the court was faced with the problem of using special interrogatories when both compensatory and punitive damages were awarded in a civil lawsuit with multiple defendants. The court noted:

> Where as here, defendants, if liable at all, are liable for causing the same injury, a jury given special interrogatories should be asked what amount of damages the plaintiff has suffered. All defendants found liable for the injury are then jointly and severally liable for the single award of compensatory damages. Punitive damages, however, are properly assessed separately against individual defendants.

Gagnon, 696 F.2d at 19 n.2. See also Embrey v. Holly, 293 Md. 128, 442 A.2d 966 (Md. 1982) (where the plaintiff asserted a claim against a radio show host and the corporate operator of the radio station for defamation. In addressing the issue of punitive damages, the court noted that "punitive damages, in essence, represent a civil fine, and as such, **should be imposed on an individual basis.**"); Davidson v. Dixon, 386 F. Supp. 482, 490 (Del. 1974) aff'd 529 F.2d 511 (3rd Cir. 1975) (where a state prisoner sought compensatory and punitive damages arising from a beating inflicted by prison guards. The court held that even though there was no basis for distinguishing between the culpability of the various defendants, and thus no basis for assessing punitive damage awards of different amounts, separate awards were still desirable.)

There are a number of other jurisdictions which similarly recognize that punitive damages should be assessed separately against co-defendants. See e.g. Thomson v. Catalina, 205 Cal. 402, 271 P. 198, 62 A.L.R.

235 (1928); Davis v. Hearst, 160 Cal. 143, 116 P. 530 (1911); Nelson v. Halvorson, 117 Minn. 255, 135 N.W. 818, Ann.Cas. 1913D, 104 (1912); McCurdy v. Hughes, 63 N.D. 435, 248 N.W. 512, 87 A.L.R. 683 (1933); Mauk v. Brundage, 68 Ohio St. 89, 67 N.E. 152, 62 L.R.A. 477 (1903).

3. The Defective Special Verdict Form Led To The Improper Determination that Kamisugi Committed Fraud.

As to the fraud claims against Kamisugi, the form of the Special Verdict raises the same problems identified in the previous section on punitive damages. The Special Verdict made it impossible for the jury to answer any of the questions which addressed the liability of **Kamisugi personally** without incorporating their evaluation of the Company's alleged wrongdoing.

Question No. 1 on the Special Verdict first asks the jurors to identify which defendants, if any, committed fraud. The first defendants identified are "Clyde H. Allison and Libbie Company, Inc." The second "group" of defendants identified are "Libbie Kamisugi and Libbie & Company, Inc." Thus, the Special Verdict improperly required the jury to evaluate Libbie Kamisugi **and Libbie & Company, Inc.** as a single entity. This was clearly erroneous since there was no evidence and/or instruction that the Company was merely the alter ego of Kamisugi.

4. The Defective Special Verdict Form Led To The Improper Determination That Kamisugi Breached A Fiduciary Duty.

Similarly, the Special Verdict, when read together with jury instruction no. 31 regarding fiduciary duty, gave the jury the unmistakable impression that Kamisugi could be vicariously liable for the wrongdoing of the Company. That is, if the jury found that either Allison

and/or the Company was liable for breach of fiduciary duty, Kamisugi was then automatically liable for such cause of action. Indeed, once the jury found "Allison and the Company" liable for breach of fiduciary duty, they were compelled to issue an identical finding as to "Kamisugi and the Company" in order to avoid an inconsistent verdict.

B. THE ASSESSMENT OF PUNITIVE DAMAGES AGAINST KAMISUGI WAS ERROR BECAUSE THERE WAS NO SUBSTANTIAL EVIDENCE OF A CLEAR AND CONVINCING NATURE THAT KAMISUGI ACTED WANTONLY OPPRESSIVELY. OR WITH MALICE.

Apart from the clear error arising from the defective Special Verdict form, the award of punitive damages against Kamisugi must be reversed because of the absence of any evidence to support such damages. The evidence must show that Kamisugi acted wantonly or oppressively or with such malice as implies a spirit of mischief or criminal indifference to civil obligations, or that there had been some wilful misconduct or that entire want of care which would raise the presumption of a conscious indifference to consequences, in order for the jury to have imposed punitive damages against Kamisugi. Masaki v. General Motors. et al., 71 Haw. 1, 780 P.2d 566 (1989). Indeed, punitive damages are not awarded for mere inadvertence, mistake, or errors of judgment. Something more than the mere commission of a tort is always required for punitive damages. Masaki, 71 Haw. at 6, 780 P.2d at 570. There must be circumstances of "intentional and deliberate wrongdoing" that has the "character of outrage frequently associated with crime". Such circumstances must be proven by "clear and convincing evidence". Masaki, 71 Haw. 1, 780 P.2d 566 (1989).

The Hawaii Supreme Court expressed clear concern that punitive damages were being too freely assessed. Because of the penal character of punitive

damages, a standard of proof more akin to that required in criminal trials was adopted. The Court stated:

> A more stringent standard of proof will assure that punitive damages are properly awarded for 'although punitive damages serve an important function in our legal systems, they can be onerous when loosely assessed.' (Cites Omitted)
>
> Accordingly, for all punitive damage claims, we adopt the clear and convincing standard of proof. The plaintiff must prove by clear and convincing evidence that the defendant has acted wantonly or oppressively or with such malice as implies a spirit of mischief or criminal indifference to civil obligations, or where there has been some wilful misconduct or that the entire want of care which would raise the presumption of a conscious indifference to consequences.(Cites Omitted)

Masaki, 71 Haw. at 16, 780 P.2d at 575.

Plaintiffs' proof falls far short of meeting this exacting standard. Kamisugi did not procure the Listing Contract with the plaintiffs. Kamisugi did not meet with the Ostermans prior to the execution of the DROA. Kamisugi was not present when the DROA was drafted and signed. And Kamisugi did not see the DROA until after it had been fully executed. Under the applicable facts, it cannot be said that the Plaintiff proved by "clear and convincing evidence" that Kamisugi was **personally** guilty of having a "positive element of conscious wrongdoing". Masaki, 71 Haw. 1, 780 P.2d 566.

C. THE AWARD OF COMPENSATORY DAMAGES AGAINST KAMISUGI WAS IMPROPER BECAUSE THE RECORD DOES NOT CONTAIN CLEAR AND

CONVINCING EVIDENCE THAT KAMISUGI PERSONALLY COMMITTED FRAUD.

In addition to the error arising from the improper Special Verdict, there is absolutely no evidence that Kamisugi committed fraud. As stated in the instructions given to the jury, a claim that Kamisugi committed fraud by intentional misrepresentation requires proof of the following elements: (1) Kamisugi made a representation as to a past or existing material fact: (2) the representation was false; (3) Kamisugi knew that the representation was false when he made it; (4) Kamisugi made the representation with an intent to defraud the plaintiffs; (5) the plaintiffs were unaware of the falsity of the representation, acted in reliance upon the truth of the representation, and were justified in relying upon the representation; and (6) the plaintiffs sustained damage as a result of their reliance upon the truth of the representation. Kang v. Harrington, 59 Haw. 652, 587 P.2d 285 (1970); Jury Instruction No. 24.

Similarly, a claim that Kamisugi committed fraud by concealment requires proof of the following: (1) Kamisugi concealed or suppressed a material fact; (2) Kamisugi was under a duty to disclose the fact to the plaintiffs; (3) Kamisugi intentionally concealed or suppressed the fact with an intent to defraud the plaintiffs: (4) the plaintiffs were unaware of the fact and would not have acted as they did if they had known of the concealed or suppressed fact; and (5) the plaintiffs suffered damage as a result of the concealment or suppression of the fact. Jury Instruction No. 29.

The evidence is clear that Kamisugi was not involved in the preparation, drafting or execution of the DROA. Claims for fraud must be proved by clear and convincing evidence. Jury Instruction No. 9. See also Dobison v. Bank of Hawaii, 60 Haw. 225, 587 P.2d 1234 (1981). Thus, the inquiry here is whether (1) there was sufficient evidence (2) of a clear and convincing nature (3)

that Kamisugi committed fraud with regard to the Nuuanu property transaction.

The Ostermans first saw the Nuuanu home at a Sunday open house. Four days later on a Thursday, the DROA was signed by the Kuhnerts and the Ostermans. The evidence is uncontroverted that Kamisugi did not meet with the Ostermans prior to the signing of the DROA. The evidence is uncontroverted that Kamisugi was not present when the DROA was drafted. The evidence is uncontroverted that Kamisugi did not see the DROA until after the contract had been fully executed by buyer and seller.

The jury did not have clear and convincing evidence that Kamisugi committed fraud. While there may have been evidence pertaining to the conduct of **Allison and the Company** pertaining to the negotiation, preparation and execution of the DROA, it is widely recognized that absent active or passive participation in such wrongful conduct, Kamisugi cannot be held personally and vicariously liable for the alleged fraud committed by the Company and/or its other agents and employees. Hagemeyer Chemical Co. v. Insect-O-Lite Co., 291 F.2d 696 (6th Cir. 1961); Cahill v. Hawaiian Paradise Park Corporation, 56 Haw. 522, 543 P.2d 1356 (1975).

In Eastern Star, Inc. v. Building Materials Corp., 6 Haw. App. 125, 712 P.2d 1148 (1985), the Intermediate Court of Appeals held that "corporate officers, directors, or shareholders are not personally **liable for the tortious** conduct of the corporation or its other agents, unless there can be found some active or passive participation in such wrongful conduct by such person." (Emphasis added.) Id. 6 Haw App. at 134, 712 P.2d at 1155. Thus, the verdict against Kamisugi for fraud cannot stand since there was no "clear and convincing" evidence that Kamisugi **personally** committed fraud.

In this regard, it is widely recognized that an officer of a corporation is not vicariously liable for the wrongdoing of the corporation absent **participation** by the officer in the wrongful act. In Cahill v. Hawaiian Paradise Park Corp, 56 Haw. 522, 543 P.2d 1356 (1975), the plaintiff claiming defamation from a radio broadcast brought a cause of action against the corporation which owned the station, the president of the corporation, and the manager of the station. The court held that the president of the corporation was not personally liable for the alleged defamatory remarks made by the radio station manager and the corporation. The court held:

> The law is firmly established that officers or directors or shareholders of a corporation are not personally liable for the tortious conduct of the corporation or its other agents, unless there can be found some active or passive participation in such wrongful conduct by such persons. (Citations omitted)

Cahill 56 Haw. at 526, 543 P.2d at 1360.

Rodrigues v. Nishiki, 65 Haw. 430, 435, 653 P.2d 1145 (1982) also involved a claim for defamation. The court dismissed two defendants from the action holding that they were not personally liable for the tortious act. The court echoed the holding of Cahill that an officer, director or shareholder of a corporation is not personally liable for the tortious conduct of -25- the corporation or its other agents. Rodrigues, 65 Haw. at 435, 653 P.2d at 1148.

To support a finding of fraud, there must be some affirmative evidence that the accused party possessed fraudulent intent. Aloha Petroglyph, Inc. v. Thomas, 1 Haw. App. 353 (1980). Otherwise, "a case could be made for any proposition in the world by the simple process of calling one's adversary and arguing to the jury that he was not to be believed." Aloha Petroglyph, 1 Haw. App. 354. (citations omitted). In Aloha Petroglyph, the claimant

sought to prove fraudulent intent by relying on the defendant's denial of ever making any statement of intent - fraudulent or otherwise.

A similar situation exists in the present case. There is no affirmative evidence that Kamisugi was involved with the specific details of the sale and purchase of the Nuuanu Property prior to the execution of the DROA. As in Aloha Petroglyph, the claim for fraud against Kamisugi cannot rest on the mere fact that the jury may not trust the credibility of opposing witnesses. Aloha Petroglyph, 1 Haw. App. 354.

D. THE AWARD OF COMPENSATORY DAMAGES AGAINST KAMISUGI WAS IMPROPER BECAUSE KAMISUGI DID NOT OWE A FIDUCIARY DUTY TO THE KUHNERTS WHERE IT IS UNDISPUTED THAT THE LISTING CONTRACT WAS EXECUTED BY THE KUHNERTS AND LIBBIE & COMPANY, INC.

It is generally recognized that the rules of agency apply to the relationship between a real estate broker and principal. Property House, Inc. v. Kelley, 68 Haw. 371, 377, 715 P.2d 805, 810 (1986). Pursuant to that relationship, the real estate broker owes a fiduciary obligation comprised of utmost good faith, integrity, honesty, and loyalty, as well as a duty of due care and diligence. Property House, 68 Haw. at 377, 715 P.2d at 810. However, the existence and effect of an agent's fiduciary duties is **contractual,** and is subject to the terms of the agreement whereby the agent agreed to act on behalf of the principal. Indeed, while a real estate broker is ordinarily an agent, the agreement between the broker and the owner of land may be such that the broker has no fiduciary duties and hence is not an agent. Restatement (Second) of Agency 13, Comment b.

It is also accepted that a **corporation** can serve as a real estate broker and be subject to the aforementioned fiduciary obligations owed to its principal. Haw. Rev. Stat. §467-1, defines a "real estate broker" as:

> [A]ny person, copartnership, or **corporation,** who for compensation or a valuable consideration, sells or offers to sell, buys or offers to buy, . . . any real estate, or the improvements thereon, for others, as a whole or partial vocation; . . .

A prerequisite to the licensing of a corporation is that the real estate brokerage business of such corporation must be under the direct management of an officer or employee who holds a real estate broker's license. Haw. Rev. Stat. 467-8(5). A corporation seeking a real estate brokers license may apply by having any member or officer sign the appropriate application and verify the information contained therein. Haw. Rev. Stat. §467-9(a)

Although Haw. Rev. Stat. §467-14(10) requires the corporate real estate broker to remain under the direct management of an officer or employee who holds a real estate broker's license, the corporation maintains an independent brokers license. In accordance with that license, the corporation itself owes a fiduciary duty to its principals. See e.g., Vicki Bagley Realty, Inc. v. Laufer, 482 A.2d 359 (D.C. Ct. App. 1984), where two real estate brokerage companies, Vicki Bagley Realty, Inc. and D'Amecourt Real Estate, Inc., were found to have breached a fiduciary duty owed to a property owner who listed his property with the D'Amecourt company. Similarly, a corporation may bring an action to collect real estate brokerage commissions owed from a principal. See e.g. Property House, Inc. v. Kelley, 68 Haw. 371, 715 P.2d 805 (1985), where Property House, Inc., a licensed real estate broker, sought to collect real estate brokerage commissions pursuant to an exclusive listing agreement that was transmitted from the prospective seller to a real estate

broker employed by Property House, Inc. It is clear that a corporation such as the Company can properly serve as a "real estate broker" and bear the responsibilities arising from such a relationship.

In the present case, it is undisputed that the plaintiffs engaged the services of the Company to market the Nuuanu property pursuant to an Exclusive Right-To-Sell Listing Agreement ("Listing Contract"). The Listing Contract was executed by: (1) the plaintiffs as the "sellers" of the Nuuanu property; and (2) Defendant Allison on behalf of the Company, which was identified as the "Listing Realtor" in the Listing Contract. **Kamisugi was not a party to the Listing Contract and did not sign the agreement.** Thus, it is undisputed from the record that the only real estate broker - principal agency relationship (and accompanying fiduciary duties) was between the plaintiffs and **the Company.**

As a practical matter, the Company discharges its fiduciary duties through the actions of its employees and agents. However, **as a matter of law,** only the contracting party, the Company, and not its employees or agents, is liable for breach of fiduciary duties. In Moore v. Allstate Insurance Company, 6 Haw. App. 646, 736 P.2d 73 (1985) the Intermediate Court of Appeals held that while a claim for breach of the fiduciary duty of good faith could be brought against the insurance company, there is no similar cause of action against the insurance professional handling the file on behalf of the corporation. In Moore, the plaintiff was involved in an automobile accident with Barton Nagata ("Nagata"). Nagata sued Moore for damages. Moore demanded that defendant Allstate Insurance Company ("Allstate") defend her. Defendant Gary Bisho ("Bisho"), Allstate's chief claims adjustor, rejected Moore's demand. Moore sued both Allstate and Bisho. Defendants filed motions to dismiss pursuant to H.R.C.P. 12(b)(6), which were granted.

As with real estate brokerage companies, insurance companies discharge their fiduciary duties to insureds through the actions of employees and agents. In upholding the lower court's dismissal of Bisho, the Intermediate Court of Appeals stated:

> Moore's argument that Bisho is liable to her in his capacity as Allstate's employee and for negligently performing his duties is utterly without merit. Bisho was merely an employee of Allstate, and Moore's attempt to hold him personally liable is without precedent and legally insupportable.

Moore, 6 Haw. App. at 651. Moore follows the commonly recognized rule that the employees or agents of a contracting party are not liable for a claim of breach of fiduciary duties.

The leading case recognizing that employees and agents are not subject to an alleged breach of fiduciary duty arising out of a contractual relationship between the employer and a complaining third party is Gruenberg v. Aetna Ins. Co., 108 Cal. Rptr. 480, 510 P.2d 1032 (1973). In Gruenberg, an insured brought an action in tort against his insurance company and some of its employees and agents. The court held that an independent tort claim could be asserted against the insurance company because there is a duty of good faith which arises out of the contractual relationship between the parties. 510 P.2d at 1038. However, the Gruenberg court did not extend the right to assert the tort claim against the insurer's employees.

> Obviously, the non-insurer defendants were not parties to the agreements for insurance; therefore, they are not, as such, subject to an implied duty of good faith and fair dealing . . . Accordingly, the judgment of dismissal in favor of the non-insurer defendants must be affirmed.

510 P.2d at 1038. Accord Egan v. Mutual of Omaha Ins. Co., 157 Cal. Rptr. 482, 598 P.2d 452 (1979), cert. denied, 445 U.S. 912 (1980) (reversing judgments against Mutual's agents who "are not parties to the insurance contract and not subject to the implied covenant"). The fact that the defendants in Gruenberg included independent contractors was of no importance to the court's decision. The court in Iversen v. Superior Court of Los Angeles County, 57 Cal. App. 3d 168, 127 Cal. Rptr. 49 (1976), reached the same result.

There is no evidence that plaintiffs entered into a separate Listing Contract with Kamisugi personally. Thus, it is undisputed from the record that the only real estate broker principal agency relationship was between the plaintiffs and **the Company.** There was no separate agency relationship between plaintiffs and Kamisugi, and no basis upon which the jury could have found that Kamisugi owed a fiduciary duty to the plaintiffs.

The denial of a separate claim against Kamisugi is consistent with the legislative intent evidenced by statutory provisions which have made limited exceptions to the common law rule prohibiting the assessment of personal liability for the acts of a corporation's employees. Pursuant to Haw. Rev. Stat. §415A et al the Hawaii legislature enacted statutes regarding professional corporations which specifically provides that employees of professional corporations will be personally liable for wrongful acts they engage in even if they are performed in their capacity as employees. Haw. Rev. Stat. §415A-11. This statutory provision creates a basis for personal liability of such employees which is not recognized by the common law. Haw. Rev. Stat. §415A-2 enumerates the professions covered by Haw. Rev. Stat. §415A-11: chiropractors (Chapter 442), dentists (Chapter 448), medical doctors (Chapter 453), Naturopaths (Chapter 455), optometrists (Chapter 459), osteopaths (Chapter 460), pharmacists (Chapter 461), psychologist (Chapter 465), public

accountants (Chapter 466), veterinarians (Chapter 471), trustees of private trusts (H.R.S. §554-2) and attorneys (Chapter 605).

It is significant that while the legislature specifically created personal liability for professionals such as attorneys, doctors, accountants, etc. that work for professional corporations, it did not create personal liability for real estate professionals that work for a corporate real estate broker. Similarly, there is no personal liability for insurance professionals. See Moore, 6 Haw. App. 646, 736 P.2d 73. It can be inferred from such legislative action that there was a specific intent to prevent the imposition of personal liability for real estate professionals employed by a corporate real estate broker. See, Haw. Rev. Stat. Chapter 415A.

Here, the jury was forced to consider the breach of fiduciary duty claim against Kamisugi as though she and the Company were a single entity. Absent any evidence, jury instructions, and special verdict interrogatory on the issue of whether the Company was simply the "alter ego" of Kamisugi, it was clearly improper to designate them as an inseparable unit.

It may have seemed appropriate to identify Ramisugi and the Company as a single entity on the Special Verdict since the Company is vicariously liable for the acts of Kamisugi. However, it is widely recognized that liability cannot "flow down" from the principal to the agent. See Appendix "C". (R:V7:4). Therefore, it was erroneous to identify Kamisugi and the Company as a single entity in the Special Verdict because it gave the unmistakable message to the jury that the improper conduct of the Company automatically imposed liability on Kamisugi since the two parties were treated as a single entity.

E. THE TRIAL COURT ERRED IN FAILING TO GRANT KAMISUGI'S FULL REQUEST FOR REMITTITUR.

The $78,000.00 commission is an amount that Kuhnerts were contractually obligated to pay to Libbie & Company, Inc. pursuant to the terms of the listing agreement. The commission represents Kuhnerts' consideration for the marketing and sale of their property. It is undisputed that Kuhnerts would have been obligated to pay the commission for the marketing and sale of their property **regardless of which real estate broker they retained.** That is, if Kuhnerts had retained the services of another broker, they would have been obligated to pay the same $78,000.00 commission which was owed to Libbie & Company, Inc. Therefore, inclusion of the $78,000.00 in the calculation of special damages would result in a windfall to Kuhnerts.

In addition, it is inappropriate to assess Kamisugi with joint and several liability for the contractual restitution claim of the real estate commission. The evidence clearly showed that the listing contract was executed by Libbie & Company, Inc, **not Kamisugi personally,** and that the commission was earned by Libbie & Company, **Inc., not Kamisugi personally.** Therefore, there is no basis upon which impose liability for the real estate commission on Kamisugi personally.

F. THE TRIAL COURT ABUSED ITS DISCRETION IN GRANTING PREJUDGMENT INTEREST TO THE KUHNERTS.

The trial court granted prejudgment interest to the Kuhnerts pursuant to Haw. Rev. Stat. §636-16. (R:V7:126-128). The legislative history of the statute states:

> The purpose of this bill is to more clearly define the trial judge's descretion [sic] in awarding interest in civil cases.
>
> Your Committee understands that at the present time interest is generally awarded

> commencing on the day the judgment is rendered. Where the issuance of a judgment is greatly delayed for any reason, such fixed commencement date can result in substantial injustice. Allowing the trial judge to designate the commencement date will permit more equitable results. Also, it is expected that party litigants will give serious regard to this discretion on the part of the trial judge so that those who may have had an unfair leverage by the arbitrariness of the prior rule will arrive at the realization that recalcitrance or unwarranted delays in cases which should be more speedily resolved will not enhance their position or assure them of a favorable award.

Conf. Com. Rep. No. 67 on S.B. No. 1043, 1979 Sen. Journ. at 984.

Kamisugi acknowledges that the award of prejudgment interest is within the **discretion** of the court. See Haw. Rev. Stat. §636-16; Conf. Com. Rep. No. 67 on S.B. No. 1043, 1979 Sen. Journ. at 984. However, in the present case, the award of prejudgment interest to the Kuhnerts constitutes an abuse of discretion by the trial court and must therefore be reversed. See Wiegand v. Colbert, 68 Haw. 472 (1986); Locricchio v. Legal Services Corp., 833 F.2d 13S2 (9th Cir. 1987).

In Wiegand, the Hawaii Supreme Court affirmed the trial court's decision to award prejudgment interest from the time that the defendant's insurance company rejected plaintiff's **second** settlement demand based upon what the insurance company "knew or should have known" about the defendant's potential liability when it rejected the **second** settlement offer. The insurance company apparently had information shortly after the accident which indicated a "substantial likelihood" that the defendant would be held liable to some degree. The

plaintiff proceeded to make three separate offers to settle the case for the policy limits. The trial judge declined to award prejudgment interest from the date of the accident, and instead selected the date of the insurance company's reply to the **second** of the three settlement offers. Wiegand, 68 Haw. at 478.

In Locricchio, the Ninth Circuit affirmed the trial court's denial of prejudgment interest. Locricchio arose out of plaintiff's dismissal as the director of the legal aid society. Plaintiff was dismissed on September 23, 1978. He filed a lawsuit against the legal aid society on August 6, 1980. Plaintiff's first discovery requests were submitted on April 12, 1983. Trial apparently commenced in late 1985. Plaintiff received a final judgment of $337,500.00 plus post-judgment interest. **The trial court denied Plaintiff's request for prejudgment interest, and noted that much of the delay in rendering judgment was the result of plaintiff's dilatoriness.** Locricchio, 833 F.2d at 1360.

The appellate court recognized that the trial court has discretion to designate the date for commencement of interest on a judgment, and that such a determination will be reversed only for an abuse of discretion. Locricchio, 833 F.2d at 1360. Based upon the grounds stated by the trial judge, the appellate court found that the **trial court properly exercised its discretion by rejecting Plaintiff's request for prejudgment interest.**

The present case is factually similar to the circumstances described in Locricchio. In the present case, Kuhnerts cannot blame anyone except themselves for any delay in obtaining a judgment in this matter. Kuhnerts filed the complaint which is the basis for the present action on October 13, 1988. One year later, on **October** 13, 1989, Kuhnerts filed their pre-trial statement. Kuhnerts' pre-trial statement included a section entitled "Statement of Settlement Conference" which stated:

> Plaintiffs are willing to discuss settlement **after discovery is completed.** Discovery is still actively ongoing and Plaintiffs are not ready for trial. Amendments to the pleadings are contemplated. (Emphasis added.)

(R:VI:261-274). Thus, Kuhnerts were **unwilling** to discuss settlement as of **October** 13, 1989.

In light of the Kuhnerts' casual attitude in prosecuting this matter, it would be manifestly unjust to impose prejudgment interest against Kamisugi. This is especially true given Kamisugi's limited involvement in the underlying real estate transaction.

VIII. CONCLUSION

Based upon the foregoing, Kamisugi respectfully requests that the Order Denying Motions for JNOV/New Trial be reversed, and that judgment be entered in favor of Kamisugi. In the alternative, Kamisugi respectfully requests that the Order Denying Motions for JNOV/New Trial be reversed and the matter remanded for a new trial.

Furthermore, Kamisugi respectfully requests that the order Granting In Part And Denying In Part Plaintiffs' Motion For Prejudgment Interest be reversed, and that Kuhnerts' request for prejudgment interest be denied.

IX. STATEMENT OF RELATED CASES

Counsel is unaware of any related cases pending in the Hawaii Courts or agencies.

DATED: Honolulu, Hawaii, May 14, 1991.

/s/ John Y. Yamano
WILLIAM C. McCORRISTON
JERROLD Y. CHUN
JOHN Y. YAMANO
Attorneys for Defendant-
Appellant/Cross-Appellee
MARION LIBBIE KAMISUGI

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

HEINZ W. KUHNERT and SHERILYN MARIE KUHNERT,	) CIVIL NO. 88-3197)) SPECIAL VERDICT
Plaintiffs,	)
vs.	)
CLYDE H. ALLISON, LIBBIE & COMPANY, INC., a Hawaii corporation, MARION LIBBIE KAMISUGI, DARLENE M. OSTERMAN, and HERBERT DAVID OSTERMAN	)
Defendants.	)

SPECIAL VERDICT

The jury must answer all of the questions unless otherwise indicated. To understand what issues are being submitted to you, you may wish to read over the entire Special Verdict before proceeding to answer. Answer the questions in numerical order. Follow all directions carefully. Each answer requires the agreement of at least ten (10) jurors; however, the same ten (10) jurors need not agree on each answer. If you do not understand any question or if you wish to communicate with the Court on

any other subject, you must do so in writing through the Bailiff.

CLAIMS OF HEINZ AND SHERILYN KUHNERT

1. Did any of the defendants commit fraudulent misrepresentation or fraudulent concealment?

Yes √ No

If your answer is "yes", please put a check mark by such defendant or defendants, and then go to Question No. 2. If your answer is "no", go to Question No. 3.

Clyde H. Allison and Libbie & Company, Inc. √

Libbie Kamisugi and Libbie & Company, Inc. √

Darlene M. Osterman √

David Osterman √

2. Was the fraudulent misrepresentation and/or concealment by a defendant a legal cause of actual damage to the plaintiffs?

Yes √ No

If your answer is "yes", please put a check mark by such defendant or defendants.

Clyde H. Allison and Libbie & Company, Inc. √

Libbie Kamisugi and Libbie & Company, Inc. √

Darlene M. Osterman √

David Osterman √

3. Did defendant Clyde H. Allison and Libbie & Company, Inc., and/or Libbie Kamisugi and Libbie & Company, Inc. breach a fiduciary duty to the plaintiffs?

Yes √ No

If your answer is "yes", please put a check mark beside the name of such defendant or defendants and go to Question No 4. If your answer is "no", go to Question No 5.

Clyde H. Allison and Libbie & Company, Inc. √

Libbie Kamisugi and Libbie & Company, Inc. √

4. Was the breach of a defendant's fiduciary duty a legal cause of actual damage to the plaintiffs?

Yes √ No

If your answer is "yes", please put a check mark by such defendant or defendants.

Clyde H. Allison and Libbie & Company, Inc. √

Libbie Kamisugi and Libbie & Company, Inc. √

5. If your answer to Question 2 and/or 4 was "yes" state the amount of actual damages suffered by the plaintiffs in the spaces set forth below. If your answer to Questions No. 2 and 4 are "no", then go to Question No. 1 under "CLAIMS OF DEFENDANTS DARLENE AND DAVID OSTERMAN.

Heinz and Sherilyn Kuhnert:

Special Damages $498,625.00

Heinz Kuhnert:

General Damages $20,000.00

Sherilyn Kuhnert:

General Damages $10,000.00

6. Should any defendant be assessed with punitive damages?

Yes √ No

If so, place the amount of such assessment by such defendant or defendants:

Clyde H. Allison and Libbie & Company, Inc.	$500,000.00
Libbie Kamisugi and Libbie & Company, Inc.	$1,465,000.00
Darlene M. Osterman	$250,000.00
David Osterman	$250,000.00

CLAIMS OF DEFENDANTS DARLENE AND DAVID OSTERMAN

1. Did plaintiffs or either of them commit fraudulent misrepresentation?

Yes No √

If your answer is "yes", then go to the next question.

If your answer is "no", then sign and date the verdict form and call the bailiff.

2. Was such fraudulent misrepresentation a legal cause of damage to defendants Darlene and David Osterman?

Yes No

If your answer is "yes", then go to Question No. 3.

If your answer is "no", then sign and date the verdict form and call the bailiff.

3. If your answer to Question No. 2 was "yes", then state actual damages sustained by the defendants as follows:

Darlene and David Osterman:

Special Damages $_____

4. Should plaintiff Heinz Kuhnert be assessed with punitive damages?

Yes No

If your answer is "yes", state the amount thereof:

Darlene and David Osterman:

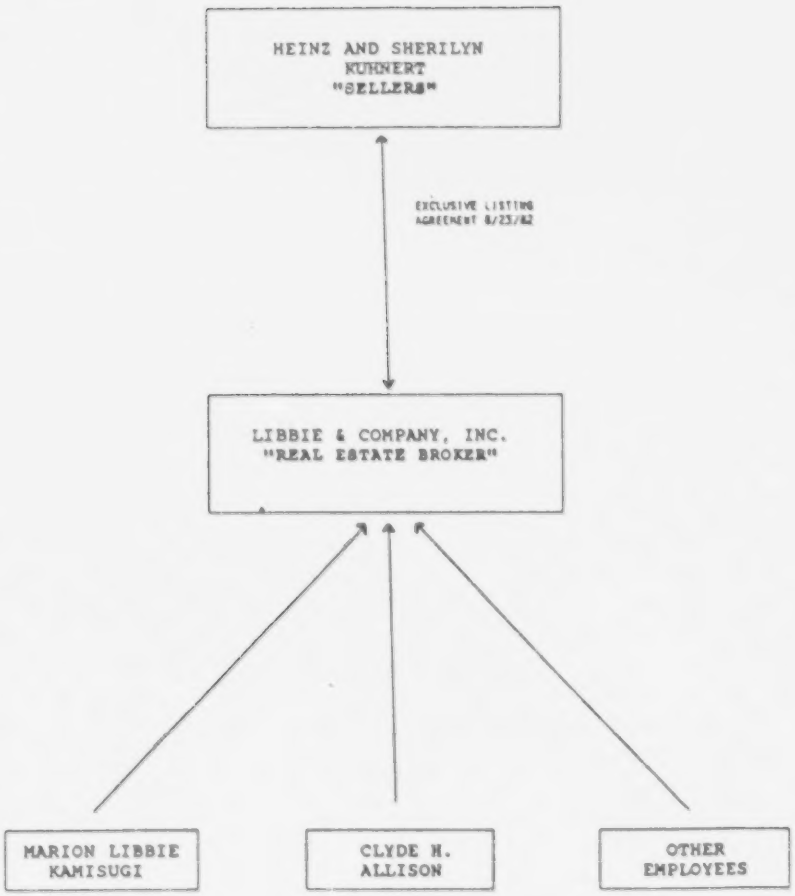
Punitive Damages _____

Dated at Honolulu, Hawaii, June 19, 1990. 10:22 a.m.

/s/_____

Foreperson

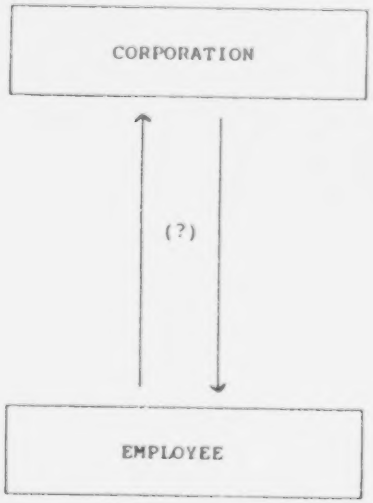
Appendix B for
Appendix G



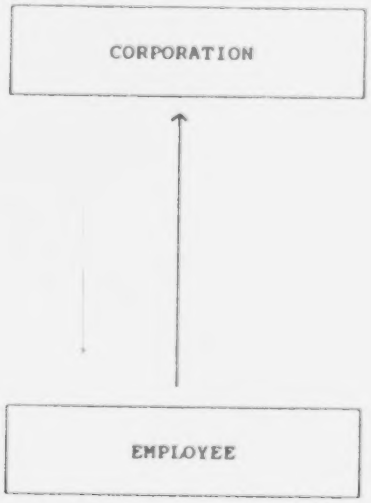
Appendix C for
Appendix G

A 236

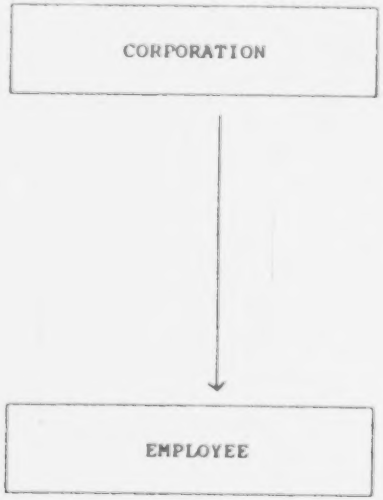
SPECIAL
VERDICT FORM



PROPER APPLICATION
OF VICAROUS LIABILITY



IMPROPER APPLICATION
OF VICAROUS LIABILITY



PERMISSION TO COPY DENIED. HRS 606.13, etc.

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

HEINZ W. KUHNERT ET AL. Plaintiffs, vs. CLYDE H. ALLISON, ET AL. Defendants.	) CIVIL NO. 88-3197-10

TRANSCRIPT OF PROCEEDINGS

before the Honorable LELAND SPENCER, Judge,

presiding, on August 29, 1990

APPEARANCES

For the Plaintiff: RONALD AU, ESQ.
GERALD KURASHIMA, ESQ.
Attorneys at Law

For Clyde Allison: PAUL LUNCH, ESQ.
Attorney at Law

For M. Libbie Kamisugi:
WM. MC CORRISTON, ESQ.
JERROLD CHUN, ESQ.
Attorneys at Law

REPORTED BY
LAURA A. AWANA, RPR, CSR-238
OFFICIAL COURT REPORTER
STATE OF HAWAII

THE COURT: The record will reflect the presence of counsel.

The jury found in this case that the plaintiff's real estate agent, Clyde Allison and the principal acting broker, well that is to say the principal broker of Libbie & Company, namely Libbie Kamisugi breached fiduciary duties to the plaintiff and that those defendants, together with the defendant buyers Darlene and David Osterman, committed fraudulent misrepresentations or concealment.

The facts were detailed and involved and the evidence was both direct and circumstantial. In general, the case involved plaintiffs who entered into a DROA to sell a Nuuanu home for one million three hundred thousand dollars by way of an agreement of sale with a portion of the purchase price to be a penthouse apartment valued for the purpose of the transaction at nine hundred and fifty thousand dollars.

The apartment was to be sold by the buyers within two years and proceeds of nine hundred and fifty thousand dollars from the sale were to be paid to the plaintiffs. If the apartment was not sold within two years, then the apartment was to be transferred to the plaintiffs with a value of nine hundred and fifty thousand dollars applied to the purchase price of the Nuuanu home.

Clyde Allison, the real estate agent for the plaintiffs and David and Darlene Osterman the buyers who were husband and wife and one of whom was a real estate agent, all represented to the plaintiff at a meeting at the plaintiff's house, prior to the signing of the DROA, that the penthouse apartment was at that time worth a million dollars and could be sold for that amount.

The evidence was that the plaintiff relied upon and was induced by such representations to enter into the transaction.

David and Darlene Osterman, the buyers, did not disclose to the plaintiff that eighteen months earlier their penthouse apartment had been appraised at only four hundred and eighty five thousand dollars, all though the buyers not only had represented the current value of the apartment to be a million dollars, but knew that the plaintiff contemplated an immediate resale of the apartment for the purpose of raising nine hundred and fifty thousand dollars.

The evidence showed that the market, since the four hundred and eighty five thousand dollar appraisal had been relatively weak and flat.

Also undisclosed to the plaintiffs was the fact that prior to the execution of the DROA, Clyde Allison the real estate agent had told Darlene Osterman, the buyer, that if she waived her commission as a real estate agent the transaction would go more smoothly.

And thereafter Darlene Osterman never requested a commission or involved her broker Luke & Luke and there was evidence that she never disclosed to the plaintiffs that she was a real estate agent prior to the execution of the DROA.

There was also evidence, this Court feels, from which the jury could find that Libbie Kamisugi was aware of the non disclosure prior to the DROA being signed of the fact that Darlene Osterman, one of the buyers, was a real estate agent.

Shortly after the DROA was executed and prior to the closing on the agreement of sale, Darlene Osterman transferred her real estate license to the plaintiff's broker which is the corporate defendant Libbie & Company.

The evidence showed that the plaintiff's principal broker, Libbie Kamisugi, was the president and one hundred percent owner of Libbie & Company.

There was evidence also that prior to the transaction, that is the closing of the DROA - I'm sorry, the execution of the DROA, Libbie Kamisugi communicated with Clyde Allison about the possible transaction with the plaintiffs, that is between the plaintiffs and David and Darlene Osterman, and that Libbie Kamisugi approved the DROA shortly after the parties executed the document.

Evidence also showed that within a week or two after execution of the DROA and before the closing, Libbie Kamisugi approved the transfer of Darlene Osterman's real estate license to Libbie Kamisugi, Libbie and company.

The penthouse apartment did not sell within the two year period set forth in the DROA and resulting agreement of sale and hence was transferred to the plaintiffs with the value of nine hundred and fifty thousand dollars applied toward the purchase price owed to the plaintiffs.

In February 1987 the plaintiffs sold the apartment for six hundred and twenty five thousand dollars. The jury returned a verdict against all the defendants for compensatory and punitive damages.

The defendants in this hearing seek judgment notwithstanding the verdict or new trial, complaining that there was a lack of evidence to support the verdict with respect to liability, compensatory and punitive damages.

Defendants also contend that the verdict form was erroneous and is itself a basis for a new trial.

The Court finds that all though the question is not an easy one, there was substantial evidence from which the jury could find that the defendants Clyde Allison, Libbie Kamisugi, Darlene and David Osterman conspired together to defraud the plaintiffs by persuading plaintiffs to accept the value of nine hundred and fifty thousand dollars on the penthouse apartment by falsely representing even the

defendants beliefs that the apartment had a current market value of a million dollars and that the apartment would sell for such amount.

The Court finds that there is substantial evidence, direct and circumstantial, to support the verdict with respect to liability, compensatory and punitive damages of the defendants.

The Court also finds that no objection was made to the verdict form at the time the verdict form was settled on the record, with respect to the complaints raised in these post trial motions. And thus, such complaints have been waived.

The Court will therefore deny the motions for judgment notwithstanding the verdict and for new trials. But the Court will set a date for further hearing on the issue of remittitur.

Perhaps I should backtrack and say at this point I'm not denying the - no, let me stick with it, I will deny the motions for judgment notwithstanding the verdict and new trial and I am going to set a date for hearing on whether or not the Court should grant a remittitur and/or new trial, that is and/or permit the plaintiff to seek a new trial. And I will set that date next week, next Friday at 1:30 PM. Are there any questions?

MR. AU: Is the remittitur on all the damages or just on the punitive damages?

THE COURT: I haven't -- I haven't stated, think right now it's an open question. I have told or discussed at least on the record a thought that forty two thousand dollars of the compensatory damages seemed in the Court's mind to be what the jury could have attributed to furnishings and I have expressed some concern as to whether or not furnishings is an item that should be the subject of a damage award over and above the three one and twenty five thousand dollars. So that's just a discussion

that I had on the record at our last hearing, and that certainly should give you some idea for thought.

MR. AU: May we file, with your permission, since it will be on the issue of actual damages as well then, your Honor, a motion immediately to be heard at 1:30 on the issue of whether or not the Court will allow prejudgment and post judgment interest?

THE COURT: You can certainly file a memo that addresses that.

MR. AU: To be heard next Friday.

THE COURT: Yes.

mr. AU: All right.

THE COURT: I don't want to -- there's still the issue as to whether or not prejudgment interest under the heading of remittitur should be taken out, that the jury assessed. I haven't indicated an inclination to do that but that's an issue open I think, and in any event if it isn't taken out certainly the Court doesn't intend to permit double prejudgment interest.

MR. AU: Yes.

THE COURT: The only thing I am concerned about is in denying the motion for new trial, have I -- that the defendants seek, have I done something inconsistent with remittitur? I don't think so because in the remittitur procedure the plaintiff I think that he's given the option of new trial to protect the plaintiff's jury trial rights.

MR. AU: That's correct.

THE COURT: So I don't think I have done anything inconsistent. If I have, somebody will correct me.

MR. AU: Finally, may I prepare -- may we prepare an order as to the extent of the Court's ruling today?

THE COURT: Yes.

MR. AU: Thank you, your Honor.

MR. MCCORRISTON: Your Honor, I presume the Court stay order and execution will continue until these matters are resolved.

THE COURT: Let's address this point. There's not only a stay order on execution but also the time running on the right of parties to appeal. I don't want that to become a problem. Why don't we --

MR. MCCORRISTON: When you enter the order denying the motion, the motions, I think we have a problem.

THE COURT: All right.

MR. MCCORRISTON: I think you could stipulate to extend the time for appeal. It is stayed by the motions pending, so all though the Court has orally ruled today, if it withholds the entry of the order until after the Friday - next Friday's proceeding I don't think we will have a problem procedurally.

THE COURT: Mr. Au?

MR. AU: Well, until the Court rules on the entire motion, because it's a motion for remittitur, I don't see how the time runs Judge.

MR. MCCORRISTON: Motions for remittitur do not stay the appeal.

THE COURT: In any event, there's no prejudice to anybody by the Court not signing a motion denying the defendants -- that is not signing an order denying the defendant's motions pending the hearing on remittitur. So I think that's correct, that's a very practical way to address the problem of the running of the limitation period for the purpose of appeal.

Court is recessed.

MR. LYNCH: Excuse me, your Honor, next Friday September 8th? As opposed to this Friday. THE COURT: A week from this Friday. (Proceedings concluded.)

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

HEINZ W. KUHNERT, ET AL.,	)	
	)	
Plaintiff,	)	NO. CIVIL 88-3197
	)	
vs.	)	
	)	
CLYDE H. ALLISON, ET AL.,	)	
	)	
	)	
Defendant.	)	

OFFICIAL TRANSCRIPT OF PROCEEDINGS

Had Before The Honorable LELAND SPENCER, Third Division, on Friday, September 7, 1990, on FURTHER HEARING ON KAMISUGI'S MOTION FOR REMITTITUR and on THE OSTERMANS' MOTION FOR REMITTITUR.

APPEARANCES

For the Plaintiff:	RONALD AU, ESQ. GERALD KURASHIMA, ESQ.
For the Defendants:	PAUL LUNCH, ESQ. WM. MC CORRISTON, ESQ. JERROLD CHUN, ESQ.

REPORTED BY: Ann Kilroy, CSR #144
Official Reporter

(EXCERPT BEGINS ON PAGE 55)

And if you look at Kono's affidavit it's even less.

THE COURT: Thank you. I have heard from all the parties now. I will take a recess and then I am going to see if I can't come back in about twenty minutes with a ruling in this case.

Court is in recess.

(Recess taken.)

THE COURT: Let the record reflect the presence of counsel.

I have a head cold, so if I have difficulty enunciating my words, counsel will understand. And if you don't understand something I say, just tell me and I will try to repeat it more clearly.

Turning to compensatory damages, the Court finds that $78,000 is the amount of the commission which plaintiffs paid and are entitled to receive back by reason of a breach of fiduciary duty on the part of defendants Libbie and Company, Clyde Allison and Libbie Kamisugi, even if such sum is over and above the recovery of damages sufficient to make the plaintiffs otherwise whole. However, the Court finds that the sum was improperly assessed against Darlene and David Osterman and will order a remittitur in that amount to those defendants. That's finding number one.

Two, the Court finds that the award of $325,000 as an item of compensatory damages included damages for the missing furnishings. The Court further finds that they improperly awarded $42,000 for the missing furnishings over and above the $325,000 and that the defendants are entitled to a remittitur of $42,000 as to compensatory damages.

Three, the Court finds that it erroneously permitted the issue of interest to be tried as an item of damages at trial over the objection of the defendants and that the jury awarded $53,625 as damages on this item, and the Court will grant a remittitur of compensatory damages in this amount.

In all other respects the Court will deny request for remittitur as to compensatory damages.

Turning to punitive damages. As to the defendant Clyde Allison the Court finds that there is no evidence in the record concerning Clyde Allison's financial condition. Although the Court feels that the absence of evidence does not permit the Court to withhold the submission of the issue from the jury, the Court feels that it is a factor for the Court to consider in a hearing such as this on the issue of remittitur. The Court particularly feels that this is so when punitive damages have been returned by a jury in excess of compensatory damages. The Court finds that the punitive damages against Clyde Allison are excessive and a result of passion and that there should be a remittitur of $300,000, leaving a balance of $200,000 as punitive damages against Clyde Allison.

Turning to defendant Libbie Kamisugi, this Court finds that there was substantial evidence from which the jury could find that the defendants Clyde Allison, Libbie Kamisugi, Darlene and David Osterman conspired together to defraud plaintiffs to accept a value of accepting a value of $950,000 on the penthouse apartment by falsely representing the defendants' own state of mind that the apartment had a market value of $1 million and could be sold for $950,000 during the two year term of the agreement of sale. The Court stated this finding in giving its ruling, that is in denying the motion for new trial, or the judgment notwithstanding the verdict at the last hearing. However, there is no evidence that Libbie Kamisugi played a leading or active role in the conspiracy. And bearing in mind the evidence of Libbie Kamisugi's financial condition

the Court nonetheless finds that the punitive damages of $1,465,000 are grossly excessive and a result of passion. The Court will order remittitur of four-fifths of that amount, or $1,172,000, leaving a balance of $293,000 punitive damages against Libbie Kamisugi.

Turning next to David Osterman, the Court finds from the affidavit of David Osterman that he is permanently physically and mentally disabled and deprived of earning power. The Court finds from the evidence adduced at trial that he is insolvent. That is actually more accurately stated that he has a negative net worth. And the Court is searching for the proper legal basis upon which to set aside the punitive damage award under the circumstances. A remittitur does not entitle the Court to, as I understand it, simply eliminate a punitive damages award. I can grant Mr. Osterman a new trial on the issue of punitive damages, which is a reconsideration of what I did previously at our last hearing. I can grant him a remittitur of all but $1,000 .

Plaintiff on each item of remittitur that I grant today is given the alternative of a new trial.

Those are the two procedural ways the Court feels it can go. What I would like to do is -- well, I frankly don't know which way to go.

Mr. Lynch, do you have any input?

MR. LYNCH: Not at this point, Your Honor. If I could reserve that until we come back next week?

THE COURT: Well, I want to issue a final order. I think what I am going to do is order or grant a new trial as to David Osterman on the issue of punitive damages. And this is really a reconsideration of the denial of the new trial that I made last week or the week before. And if Mr. Au objects to being cut off guard on this, I will grant a further hearing and give Mr. Au a further opportunity to argue the issue. But absent an objection, that will be my order

So Mr. Lynch, you will draft an order that will grant Mr. Osterman a new trial on the issue of punitive damages.

MR. LYNCH: Yes, Your Honor. Just to make sure that the record is clear, you stated at the beginning of your finding with respect to Mr. Osterman based upon his affidavit you find him permanently disabled. I just wanted to make it clear it's his doctor's affidavit.

THE COURT: Very well. Now, in all other respects Mr. Au will be drafting the orders in connection with the denial of new trials as to the other defendants and the denial of judgments notwithstanding the verdicts.

MR. AU: May I ask a question on that?

THE COURT: Yes.

MR. AU: Then do I understand the Court's order Mr. Lynch will be drafting as to new trial as to David Osterman limited to the issue of whether or not punitive damages should be assessed against him?

THE COURT: Correct.

MR. AU: Thank you.

THE COURT: Turning next to Darlene Osterman, the Court finds that at the time of trial Darlene Osterman had a negative net worth. Under these circumstances the Court finds that the punitive damages assessed against Darlene Osterman was excessive and based on passion, and the Court will grant a remittitur of $125,000, leaving a balance of $125,000 punitive damages as an award in favor of plaintiff and against Darlene Osterman.

In each respect in which the Court has granted remittitur the plaintiff is granted the right of a new trial. I think I have covered each of the issues we are reporting today.

MR. LYNCH: Your Honor, I think we need to address punitive damages with respect to Libbie and Company.

THE COURT: All right. I had ruled during the trial that because the Court had determined as a matter of law that Both Libbie Kamisugi and Clyde Allison were hierarchy of Libbie and Company, Libbie Kamisugi being the owner and president and Clyde Allison being the vice president and general manager, I believe, that Libbie and Company was vicariously responsible not simply for compensatory damages but for punitive damages as well. More accurately stated Libbie and Company was responsible for the acts of Clyde Allison and Libbie and Company because their acts were the management of Libbie and Company. I don't think it's accurate to say Libbie and Company was vicariously responsible but rather their acts were the acts of Libbie and Company because of the status they held within the company, that is the position they held within the company. The Court was then faced with Libbie and Company being held liable for two separate punitive damages awards, which the Court felt was unfair and to which the defendant objected and the Court agreed. The Court accordingly held that it would hold Libbie and Company liable for the greater of the two punitive damages awards and not for both punitive damage awards. The award against Libbie Kamisugi was of course the greater of the two awards prior to the hearing today and even after the hearing today remains the greater of the two awards.

Based on the remittitur the punitive damage award assessed against Libbie Kamisugi is $293,000. And that will be the judgment assessed against the Company as well for punitive damages.

MR. AU: Do I understand the Court is remaining untouched the emotional distress as to Heinz and Shirley?

THE COURT: Correct. What the Court has not ruled on the Court denies as far as requests for remittitur are concerned.

MR. AU: Finally, Your Honor, I would ask the Court with respect to the issue of David Osterman again, so there is no confusion, there would be a final judgment then as to the finding of the jury on the compensatory damages on everything but punitive damages, and that would be the issue of the new trial. But there would be a final judgment on everything else as to David Osterman. Am I correct, Your Honor?

THE COURT: Yes, as to compensatory damages David Osterman is responsible together with all other parties. I have denied the motion for new trial. I have denied the judgment notwithstanding the verdict. And my rulings today on compensatory damages are just as I have stated.

MR. AU: Very well, Your Honor. I understand.

THE COURT: But I am, as I indicated before, a little bit unsure as to procedurally how to proceed with David Osterman. Here is a man that is permanently and physically and mentally disabled and has no earning power and based on the evidence before the Court has no -- that is, has a negative -- that is, is insolvent. And I hesitate to grant a remittitur that leaves even $1,000 punitive damages against a man that -- under those circumstances. So the only thing I could think of to do is to grant a new trial.

MR. LYNCH: One question, Your Honor. The basis -- I understand the basis on which the Court is awarding a remittitur and punitive damages of $283,000 against Libbie and Company and the same amount against Libbie Kamisugi. My question is is that joint and several.

THE COURT: The judgment presently is joint and several. By that I mean -- wait a minute.

MR. MC CORRISTON: The Court is correct. The judgment is currently joint and several.

MR. LYNCH: I am just addressing myself to the notion whether the payment of one or the other of that sum automatically relieves the other.

THE COURT: Correct. I understand the point.

Mr. Au, what is your input on that?

MR. AU: Well, I would accept any suggestion by defense counsel. Because I don't want to, very candidly, have basis for error, recognizing this is one of the points they raised. I don't want me to say something and it turns out to be error on appeal. That's why. So I can see them by committing to a joint and several -- it's my understanding that the jury found each individually liable based upon the jury instructions and therefore since they were both liable both found individually liable the Court picked the higher assessment of the two as against the corporation. Now, in terms of paying the judgment, while it may read joint and several, it's my understanding that to the extent that any one of them pays the judgment it would reduce it proportionately as to the other. That's my understanding. But to just profoundly say it was a joint and several judgment, I can't agree. Because I think the Court's thinking is behind that judgment, Your Honor, which the Court has explained many times. But I do agree with Mr. Lynch that to the extent one pays the other is reduced proportionately, I do agree with that.

MR. LYNCH: I suggest we just leave it alone.

THE COURT: I tell you frankly on the record what concerns me is as I look back over this the person who suffers the smaller punitive damage award does not have the benefit -- I was going to say the benefit of the corporation helping them pay it. But of course the corporation is entitled to -- I don't think there is any contribution for punitive damages. So the injustice of the thing is that the

person who is assessed with the smaller of the awards ends up having to pay it themselves.

In this case Clyde Allison ends up having to pay the whole award himself, assuming it was in force, without the benefit of having the plaintiff first turn to the company. And that worked out because of an effort by the Court to avoid assessing the company twice. Now that the dust has settled I am trying to put myself back into the shoes -- that is back into the position we were in when we were discussing how the verdict form would be worded.

The question is, Mr. McCorriston, whether both Libbie Kamisugi and the Company are both individually liable for the full amount.

MR. MC CORRISTON: The Court understands what my position was on the verdict form and the judgment. As I understand the Court's ruling was that in so far as the judgment is concerned that Libbie Kamisugi individually and Libbie Kamisugi and Company would be joint and severally liable for the greater amount.

Naturally if either party pays any judgment, given the state of the evidence, I know who is going to end up paying it. But that's the status of the judgment. And that Clyde Allison would not be responsible for any part of the judgment against Libbie Kamisugi and Company. But neither would he get the benefit from what she paid. That's how the judgment is structured now.

THE COURT: What was your understanding, Mr. Au?

MR. AU: Your Honor, we did not want to have the corporation pay more than it was fair for them to pay. I think that was the whole basis of the Court's rulings in our discussions in chambers, more than they would have to pay. I think the Court's thinking around the whole thing as it turned out was that since Libbie, Ms. Kamisugi, owns 100 per cent of the corporation as a practical matter, whether

the corporation paid it or she paid it, whether it was on the left or the right pocket, it would not make a substantial difference So the whole point of it was not to assess a greater amount to the corporation than was necessary. That's why the Court from the original verdict form, if you recall, took off Libbie and Company from Clyde Allison. It originally read Clyde Allison and Libbie and Company.

THE COURT: You are repeating what you said, now. If the theory was that because Clyde Allison and Libbie Kamisugi because their acts in effect are the acts of the corporation because of the high position they held in the corporation, then that assessment against Libbie Kamisugi for which the corporation is also liable is joint and several and is reduced by the amount paid by either one of them; is it not? Since the corporation is being held liable because the act of Libbie Kamisugi was the act of the corporation. That was the theory. In other words, we did not get a separate -- in other words, the corporation was not assessed separately from Libbie Kamisugi. It was assessed the same amount as Libbie Kamisugi because the act of Libbie Kamisugi is the act of the corporation.

MR. AU: That's correct, Your Honor.

THE COURT: Therefore, to the extent the corporation pays the judgment the judgment is reduced. That is, the judgment against Libbie Kamisugi and the corporation for punitive damages, which is presently in the amount of $293,000, is reduced. To the extent Libbie Kamisugi pays it, it's reduced against the corporation.

MR. AU: I agree with the Court. I have no problem with that.

THE COURT: That was the question. Anything further?

MR. AU: The interest, the question of how will the Court be handling the issue of the interest, Your Honor?

THE COURT: We have a motion on pre-judgment interest pending and I will give you another date for a hearing on that.

MR. MC CORRISTON: Can we also be heard on security at that time so we don't have to come back another time?

MR. AU: What?

THE COURT: Security. That means supersedeas bond.

MR. MC CORRISTON: Or adequate security.

THE COURT: Or some type of security pending appeal. Another hearing date. How much time do you need?

MR. MC CORRISTON: Your Honor, I am sure I can do it on the same date the Court has convenient for Mr. Au.

THE COURT: The Court begins its vacation Thursday, so Wednesday is my last day. Wednesday is the last day. Vacation will carry me through the balance of next week and the week after. So we either have the hearing Wednesday. Maybe that would be a good time for the hearing. 1:30 Wednesday.

MR. MC CORRISTON: Your Honor, I assume the stay will continue until the Court rules and amends its judgment according to the rulings today.

THE COURT: Yes, under the procedure my understanding is that -- well, let me just speak to Mr. Au. Your intent is not to attempt to enforce a judgment at this time.

MR. AU: Well, we can't, because we don't know the amount yet, Your Honor. That's what we are coming back for.

MR. MC CORRISTON: I think probably it's just a natural consequence until the judgment is amended it can't be executed. So I just assume we will continue.

THE COURT: Yes. Thank you, counsel.

Court is recessed.

(The Court stood adjourned for the day.) (4:37 p.m.)

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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

HEINZ W. KUHNERT and SHERILYN MARIE KUHNERT,	) CIVIL NO. 88-3197-10
Plaintiffs,	) (CONTRACT)) FIRST AMENDED) JUDGMENT
vs.	)
CLYDE H. ALLISON, LIBBIE & COMPANY, INC., a Hawaii corporation, MARION LIBBIE KAMISUGI, DARLENE M. OSTERMAN, HERBERT DAVID OSTERMAN, JOHN DOE 1-5, DOE CORPORATION 1-5, DOE PARTNERSHIP 1-5, and DOE GOVERNMENTAL ENTITITY 1-5,	) TRIAL: Commenced May 10, 1990) JUDGE: Hon. Leland L. Spencer
Defendants.	)

FIRST AMENDED JUDGMENT

Pursuant to the Special Verdict returned by the jury on June 19, 1990, after trial and hearing on August 27, 28, 29, 1990 and September 7, 12, 1990, with Ronald G. S. Au and Gerald H. Kurashima appearing for Plaintiffs Heinz W. Kuhnert and Sherilyn Marie Kuhnert, Paul A. Lynch appearing for Defendants Clyde H. Allison, Libbie & Company, Inc., Darlene H. Osterman and Herbert David Osterman, and William C. McCorriston and Jerrold Y. Chun appearing for Defendant Marion Libbie Kamisugi, this Court enters a First Amended Judgment for the Plaintiffs Heinz W. Kuhnert and Sherilyn Marie Kuhnert as follows:

SPECIAL DAMAGES

1. Against Defendants Clyde H. Allison, Libbie & Company, Inc., a Hawaii Corporation, Marion Libbie Kamisugi, Darlene M. Osterman, and Herbert David Osterman, jointly and severally, Special Damages to Plaintiffs Heinz W. Kuhnert and Sherilyn Marie Kuhnert in the sum of Three Hundred Twenty-Five Thousand and no/100 Dollars ($325,000 00),

2. Against Defendants Clyde H. Allison, Marion Libbie Kamisugi and Libbie & Company, Inc., a Hawaii Corporation, jointly and severally, Special Damages to the Plaintiffs Heinz W. Kuhnert and Sherilyn Marie Kuhnert in the sum of Seventy-Eight Thousand and no/100ths Dollars ($78,000.00).

GENERAL DAMAGES

1. Against Defendants Clyde H. Allison, Libbie 6 Company, Inc., a Hawaii Corporation, Marion Libbie Kamisugi, Darlene M. Osterman, and Herbert David Osterman, jointly and severally, General Damages to Plaintiff Heinz W. Kuhnert in the sum of Twenty Thousand and no/100ths Dollars ($20,000.00);

2. Against Defendants Clyde H. Allison, Libbie 6 Company, Inc., a Hawaii Corporation , Marion Libbie Kamisugi, Darlene M. Osterman, and Herbert David Osterman, jointly and severally, General Damages to Plaintiff Sherilyn Marie Kuhnert in the sum of Ten Thousand and no/100ths Dollars ($10,000.00).

PUNITIVE DAMAGES

1. Against Defendant Clyde H. Allison, Punitive Damages to Plaintiffs Heinz W. Kuhnert and Sherilyn Marie Kuhnert in the sum of Two Hundred Thousand and no/100ths Dollars ($200,000.00).

2. Against Defendant Marion Libbie Kamisugi and/or Defendant Libbie & Company, Inc., Punitive Damages to Plaintiffs Heinz W. Kuhnert and Sherilyn Marie Kuhnert in the sum of Two Hundred Ninety-Three Thousand and no/100ths Dollars ($293,000.00). The cumulative amount of punitive damages owed by Defendant Marion Libbie Kamisugi and Libbie & Company, Inc,, is $293,000,00. Payment by either Defendant shall reduce the principal sum owed.

3. Against Defendant Darlene M, Osterman, Punitive Damages to Plaintiffs Heinz W. Kuhnert and Sherilyn Marie Kuhnert in the sum of One Hundred Twenty-Five Thousand and no/100ths Dollars ($125,000,00).

PREJUDGMENT INTEREST

1. Against Defendants Clyde H, Allison, Libbie & Company, Inc., Darlene M. Osterman, Herbert David Osterman and Marion Libbie Kamisugi, jointly and severally, prejudgment interest at the statutory rate of ten percent (10%) per year on Special Damages of Three Hundred Twenty-Five Thousand and no/100ths Dollars ($325,000.00), commencing from the date August 1, 1985, and continuing until entry of the First Amended Judgment.

2. Against Defendants Clyde H. Allison, Libbie & Company, Inc., and Marion Libbie Kamisugi, jointly and severally, prejudgment interest at the statutory rate of ten percent (10%) per year on the Special Damages of Seventy-eight Thousand and no/100ths Dollars ($78,000.00); as follows: Prejudgment interest on Fifty Thousand and no/100ths Dollars ($50,000.00) commencing from August 1, 1983 and continuing until entry of the First Amended Judgment; and on Twenty-Eight

Thousand and no/100ths Dollars ($28,000.00) commencing from August 1, 1984, and continuing until entry of the First Amended Judgment.

Pursuant to the Special Verdict returned by the jury, the Court also enters judgment in favor of the Plaintiffs on Defendant Herbert David Osterman and Darlene M. Osterman's Counterclaim. There were no other named Defendants.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Plaintiffs shall have judgment on the Complaint in the amount of damages as stated herein, post judgment interest and their reasonable costs.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that the Plaintiffs shall have judgment on the Counterclaim and their reasonable costs.

Dated: Honolulu, Hawaii, October 16, 1990.

/s/LELAND H. SPENCER
JUDGE OF THE ABOVE-
ENTITLED COURT

APPROVED AS TO FORM:

/s/ CAROLINE P. EGLI
PAUL A. LYNCH
CAROLYN P. EGLI
Attorneys for Defendants
Clyde H. Allison, Libbie &
Company, Inc., Darlene M. Osterman
and Herbert David Osterman

/s/JERROLD Y. CHUN
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